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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 347

EDWARD ELIASON AND ELIN ELIASON,
APPELLANTS,

vs.

CHARLES WILBORN, CARRIE WILBORN, AND
NOEL STATE BANK

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED AUGUST 28, 1929

(34,478)

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[fol. 4] **IN CIRCUIT COURT OF COOK COUNTY**

In Chancery

Case No. 11946. L. R.

In the Matter of the Application of EDWARD J. HALEY and MARY A. HALEY to Register Title to Real Estate

Petition of EDWARD ELIASON and ELIN ELIASON, His Wife, for Cancellation of Certain Certificates and Memorials

PETITION—Filed July 30, 1926

To the Honorable the Judges of said Court:

Your petitioners, Edward Eliason and Elin Eliason, his wife, respectfully represent unto your Honors that under and by virtue of a decree of this court made and entered in the above entitled cause on the 6th day of August, A. D. 1921, the following described real estate, situate in the County of Cook and State of Illinois, viz:

Lot Nine (9) in Haley & Sullivan's Longwood Manor, being a subdivision of Block Eight (8) and the North half of Block Nine (9) in Hilliard & Dobbins Resubdivision of Blocks One (1) and Two (2) of the First Addition to Washington Heights lying North of Railroad in the East half of the Northwest quarter of Section Eight (8) Township Thirty-seven (37) North, Range Fourteen (14) East of the Third Principal Meridian,

was duly registered in the office of the Registrar of Titles in and for said County in the names of Edward J. Haley and Mary A. Haley, his wife, as joint tenants and not as tenants in common and a certificate of title was duly issued to them therefor; that by mesne and sundry conveyances and transfers the title to said premises has passed and become vested in your petitioners, Edward Eliason and Elin [fol. 5] Eliason, his wife, as joint tenants and not as tenants in common and that a certificate, numbered 113,893, registering the title to said premises in your petitioners was

duly issued out of the office of the Registrar of Titles in and for said County on September 21, 1923 and duly entered in register volume 197, at page 308.

Your petitioners further show that on the first day of April, A. D. 1926, they entered into a certain contract of sale or articles of agreement for warranty deed, whereby they agreed to sell and convey to George B. Kennedy and Pearl A. Kennedy, his wife, as joint tenants and not as tenants in common, the above described premises; that said contract of sale or articles of agreement for warranty deed was duly exectued by the parties thereto, as will appear by the original thereof, ready to be produced in open court, a true copy of which is hereto attached and marked Exhibit A, and made a part hereof.

Your petitioners further represent that the purchasers under said contract, shortly after the execution of the same, went into possession of the premises above described and are still in possession of the same and have, up to the happening of the events hereinafter set forth, made to your petitioners all payments required in and by said contract and the terms thereof to be made.

Your petitioners further show that in the month of May, 1926, they entered into certain negotiations with one Jerome C. Napletone doing business as Bankers Discount Co., for the sale to the said Napletone of the premises hereinabove set forth, subject to the rights of the said purchasers under said contract and also subject to a certain first mortgage in the amount of Twenty-seven Hundred Dollars ($2,700.00), which sale, when consummated, was to be effected by the conveyance of said premises by warranty deed from your [fol. 6] petitioners to the said Napletone and by the assignment to said Napletone by your petitioners of their interest in said contract of purchase; that in the course of the negotiations looking toward such sale, your petitioners entrusted to the said Napletone a duplicate original of said contract of sale and also the Certificate No. 113893 evidencing the title of your petitioners in and to said premises.

Your petitioners further show that thereafter, from about May 18, 1926 until June 18, 1926, your petitioners were constantly endeavoring to obtain from said Napletone either the amount which he had agreed to pay for said premises and said assignment of contract, or to obtain back from him the said Certificate of Title and duplicate original

contract which had been entrusted to him, but without avail; that on said June 19, 1926, your petitioners found the office before that time occupied by the said Napletone closed and were informed from other sources that the said Napletone had defrauded various people in the City of Chicago and had fled from said City of Chicago and State of Illinois.

Your petitioners further show that immediately thereafter they went to the office of Joseph F. Haas, Registrar of Titles in Cook County and then for the first time learned that the said Jerome C. Napletone had on May 19, 1926, deposited with the said Registrar of Titles the said Certificate No. 113,893 together with a pretended warranty deed from your petitioners to himself of the above described premises, which deed purported to be dated May 18, 1926, to have been acknowledged on May 18, 1926 before one John Boyle, a Notary Public in and for Cook County, Illinois, and to have been filed for record in the office of said Registrar of Titles on May 19, 1926 as Document No. 303,637 in Book 231 at page 447; that a certificate of title showing title to the above premises in the said Jerome C. Napletone, subject only to the above mentioned mortgage of Twenty-seven [fol. 7] Hundred Dollars ($2,700.00) was duly issued by said Registrar of Titles on May 19, 1926 as Certificate No. 167,919.

Your petitioners further show that said warranty deed last above referred to, purporting to be signed by your petitioners, was and is in all respects a forgery and the purported signatures of your petitioners thereto were and are in each instance forgeries and that your petitioners never knew of said deed until long after the same had been executed; that your petitioners have interviewed the said John Boyle, who as a Notary Public took the acknowledgement of the purported signers of said alleged deed and that the said John Boyle has stated to your petitioners that he never saw your petitioners or either of them before said last named interview and that the persons who acknowledged the execution of said deed before him and were introduced to him under the names of your petitioners, were not your petitioners or either of your petitioners but in fact different persons unknown to the said John Boyle.

Your petitioners further represent that thereafter a certain purported warranty deed from the said Jerome C.

Napletone to Charles Wilborn and Carrie S. Wilborn, his wife, dated May 24, 1926 and purporting to have been acknowledged on said May 24, 1926 before Julie V. Bahr, a Notary Public, was duly filed for record on May 29, 1926 in the office of the Registrar of Titles of said Cook County, Illinois and duly recorded in Book 339 at page 460 as Document No. 305,058; that your petitioners are not informed as to whether said last named warranty deed was the actual deed of the said Jerome C. Napleton and bore his genuine signature, but your petitioners show the fact to be that even if the signature thereto was genuine said deed was in [fol. 8] fact a nullity and ineffectual to convey any interest or title to the premises hereinabove described by reason of the fact that the grantor therein had not at that time and never had any title to said premises.

Your petitioners further show that at the time they learned of the recording of said two deeds, no certificate had as yet been issued by said Registrar of Titles to the said Charles Wilborn and Carrie S. Wilborn and that your petitioners promptly upon learning of the facts just hereinabove stated in reference to said deeds, protested to said Registrar of Titles against the issuing of such Certificate and notified said Registrar of Titles of the forgery of said deed from your petitioners to the said Napleton, but the said Registrar of Titles nevertheless on May 29, 1926 issued his certain Certificate of Title to the said Charles Wilborn and Carrie S. Wilborn, his wife, being Certificate No. 175,048.

Your petitioners further show that at the time of the execution and delivery of the said purported warranty deed from said Jerome C. Napletone to the said Charles Wilborn and Carrie S. Wilborn, his wife, the said Jerome C. Napletone also delivered to the said Wilborns the duplicate original of said contract of sale, a copy of which is hereto attached as Exhibit A and also delivered to the said Wilborns two purported and pretended assignments of the vendor's interest in said contract; that the first of said alleged assignments (a true copy of which is hereto attached marked Exhibit B and made a part hereof) purported to have been signed by your petitioners under date of May 18, 1926 and to have been duly acknowledged on said last named date before the said John Boyle, Notary

[fol. 9] Public; that the pretended signatures of your petitioners to said assignment were and each of them was and is forged and not the genuine or true signatures of your petitioners or either of them and that your petitioners never knew until after the events hereinabove set forth of the pretended execution and delivery of said alleged assignment and that the said John Boyle, the Notary Public before whom said assignment purports to have been acknowledged has stated to your petitioners that the persons who acknowledged before him the said pretended assignment were the same persons who acknowledged the said pretended warranty deed from your petitioners to the said Jerome C. Napletone and that they were not your petitioners nor either of them.

Your petitioners further show that with the said last mentioned purported assignment there was also a certain other purported assignment of the vendor's interest in said contract of sale from the said Jerome C. Napletone to the said Wilborns, said pretended and purported assignment being in words and figures as follows:

"For value received I hereby sell, assign, transfer and set over unto Charles Wilborn and Carrie S. Wilborn, all my right, title and interest in and to the within contract and guarantee the performance thereof.

"Given under my hand and seal this 24th day of May, A. D. 1926.

"Jerome C. Napletone. (Seal.)"

Your petitioner further shows that the said copy of the contract of sale which was delivered by said Napletone to the said Wilborns is now held by Noel State Bank, a corporation, for purposes of collection, which Noel State Bank also holds in its possession the two purported assignments of said contract of sale.

Your petitioners further show that they have made application to Joseph F. Haas, the Registrar of Titles of Cook County, Illinois, requesting him to cancel and remove [fol. 10] from his records the entries showing the two deeds hereinabove described and set forth and that the certificates issued to the said Jerome C. Napletone to the said Charles Wilborn and Carrie S. Wilborn be by him ordered delivered up and cancelled and that a certificate be issued

to your petitioners correctly setting forth the title to said premises in your petitioner but that the said Registrar has refused so to do.

Forasmuch, therefore, as your petitioners are without remedy save in a court of equity and this proceeding, your petitioners pray:

(1) That this Court may decree the said two purported warranty deeds and the said purported assignments of contract hereinabove set forth and each of them be null, void and of no effect upon the title to said premises or the interest of your petitioners thereto.

(2) That the said Registrar of Titles may be ordered and directed by decree of this Court to cancel and annul said certificates Nos. 167,919 and 175,048 and each of them and that the same may be expunged and cancelled upon the records of said Registrar of Titles.

(3) That the said Charles Wilborn and Carrie S. Wilborn and the said Noel State Bank, a corporation, may be ordered and directed by this Honorable Court to deliver to your petitioners the original duplicate contract of sale of the above described premises or articles of agreement for warranty deed and to account to your petitioners for any sum or sums paid to them by the purchasers under said contract and that the two purported assignments of the vendors' interest in said contract may by this Honorable Court be held to be null and void and of no effect.

[fol. 11] (4) That this Court may enter an order and decree finding the title to the premises aforesaid now vested in your petitioners, Edward Eliason and Elin Eliason, his wife, as joint tenants, free and clear of all liens and encumbrances except such as appear upon the certificate numbered 113893, heretofore issued to your petitioners and subject only to said first mortgage for Twenty-seven Hundred Dollars ($2700.00) and the rights of the said George B. Kennedy and Pearl A. Kennedy, his wife, as purchasers under said contract of sale and parties in possession.

(5) And that your petitioners may have such other and further relief as to your Honors shall seem meet and to equity shall appertain.

May it please your honors to grant the writ of summons in chancery, directed to the Sheriff of said Cook County, commanding him that he summon Joseph F. Haas, Registrar of Titles of Cook County, Illinois, Jerome C. Napletone, Charles Wilborn, Carrie S. Wilborn, his wife and Noel State Bank, a corporation, to appear before the said Court on the 16 day of August, A. D. 1926, then and there to answer this petition, etc.

And your petitioners, as in duty bound will ever pray, etc.

Edward Eliason, Elin Eliason. McGilvray, Eames, Vaughan & Tilley, Solicitors for Petitioners.

[fol. 12] *Duly sworn to by Edward Eliason and Elin Eliason. Jurat omitted in printing.*

[fol. 13] EXHIBIT "B" TO PETITION

Assignment

For and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt of which is hereby confessed and acknowledged, we Edward Eliason and Elin Eliason, husband and wife, transfer unto Jerome C. Napletone all our rights, title and interest in and to certain Articles of Agreement, and the real estate therein described, made on the 1st day of April, A. D. 1926 between ourselves (Edward Eliason and Elin Eliason, husband and wife) as parties of the first part, and George B. Kennedy and Pearl A. Kennedy wife as joint tenants, as parties of the second part, relating to Lot Nine (9) Block two (2) in Haley and Sullivans Longwood Manor, being a subdivision of Block Eight (8) and the north half of Block Nine (9) in Hilliard and Dobbins Resubdivision of Block One (1) and Two (2) of the First Addition to Washington Heights lying North of Rail Road in the East half of the North West Quarter of Section Eight (8) Township Thirty-Seven (37) North Range Fourteen (14) being known as 1329 W. 97th Street situated in the County of Cook and State of Illinois, and we Edward Eliason and Elin Eliason,

husband and wife, do also hereby release and waive all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois.

Dated May 18th, A. D. 1926, Chicago, Illinois.

(Signed) Edward Eliason. (Seal.) (Signed) Elin Eliason. (Seal.)

Signed, Sealed and Delivered in the Presence of:

(Signed) Albert Kirsch. (L. S.) (Signed) John Boyle, C. B. (L. S.)

STATE OF ILLINOIS,
County of Cook, ss:

I, John Boyle, a Notary Public, in and for said County, in the State aforesaid, do hereby certify that Edward Eliason and Elin Eliason, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and [fol. 14] delivered the said Instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 18 day of May, 1926.

John Boyle, C. B., Notary Public. My commission expires February 17, 1927. (Seal.)

EXHIBIT "A" TO PETITION

Articles of Agreement for Warranty Deed

(Triplicate)

Articles of Agreement, made this First day of April in the year of our Lord One Thousand Nine Hundred and Twenty Six (1926) Between Edward Eliason and Elin Eliason, his wife, party of the first part, and George B. Kennedy and Pearl A. Kennedy, his wife, as joint tenants party of the second part:

Witnesseth, That, if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on their part to be made and performed,

the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part, in fee simple, clear of all incumbrances whatever, by a good and sufficient Warranty Deed, the lot, piece, or parcel of ground, situated in the County of Cook and State of Illinois known and described as Lot Nine (9) in Block Two (2) in Haley & Sullivans Longwood Manor, being a Subdivision of Block eight (8) and the North half of Block Nine (9) in Hilliard and Dobbins Resubdivision of Block one (1) and Two (2) of the First Addition to Washington Heights, lying North or Rail Road in the East Half of the North West Quarter of Section Eight (8), Township Thirty-Seven (37) North, Range Fourteen (14) and the said party of the second part hereby convenants and agrees to pay to the said [fol. 15] party of the first part the sum of Six Thousand Seven Hundred Fifty 00/100 Dollars in the manner following: One Thousand ($1,000.00) Dollars the receipt of which is hereby acknowledged, assuming First mortgage for the sum of $2,700.00 dated April 5th, 1926, due April 5th, 1931 with interest at rate of 6% per annum payable semi-annually, the balance Three Thousand & Fifty ($3,050.00) Dollars being payable at the rate of $60.00 or more per month commencing on the Eighth day of May, A. D. 1926 and on the Eighth day of each and every month thereafter. Said monthly payments including interest at the rate of six per cent per annum payable monthly on entire principal sum remaining from time to time unpaid. Said payment also including interest on First mortgage, or impositions that may be legally levied or imposed upon said land, subsequent to the year 1925. And in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on their part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by them on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid.

Party of first part shall deliver to party of second part a Warranty Deed when said party of second part has paid

the principal sum of $4,050.00/100) also Torrens Certificate. [fol. 16] It is mutually agreed by and between the parties hereto, that the time of payment shall be of the essence of this contract; and that the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In witness whereof the parties to these Presents have hereunto set their hands and seals, the day and year first above written.

Edward Eliason. (Seal.) Elin Eliason. (Seal.) George B. Kennedy. (Seal.) Pearl A. Kennedy. (Seal.)

Sealed and Delivered in Presence of Raymond H. Broble, William J. Burkley.

[fol. 17] In Circuit Court of Cook County

[Title omitted]

Demurrer of Charles Wilborn and Carrie S. Wilborn—Filed Sept. 1, 1926

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said petition contained to be true, in such manner and form as the same are therein and thereby set forth and alleged demur to said petition, and for cause of demur show that the petitioners have not in and by their said petition made or stated such a case as entitles them in a court of equity to any discovery or relief from or against these defendants touching the matters contained in the said petition, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, these defendants demur to the said petition, and to all the matters and things therein contained, and pray the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said petition, and they pray to be dismissed with their reasonable costs in this half sustained.

[fol. 18] Charles Wilborn, Carrie S. Wilborn. Charles F. Glaeser, Joseph G. Sheldon, Solicitors for Defendants.

I hereby certify that I am one of the solicitors for the defendants named herein, and that in my opinion the demurrer is well founded in point of law.

Joseph G. Sheldon, Solicitor for Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

Joseph G. Sheldon, being first duly sworn, on oath states that he is one of the solicitors for the defendants named herein, and that the above demurrer is interposed for delay, and in order that justice may be done.

Joseph G. Sheldon.

Subscribed and sworn to before me this 31st day of August, A. D. 1926. L. M. Langley, Notary Public. (Seal.)

[fol. 19] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

DEMURRER OF NOEL STATE BANK, A CORPORATION—Filed Sept. 1, 1926

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said petition contained to be true, in such manner and form as the same are therein and thereby set forth and alleged demurs to said petition, and for cause of demur shows that the petitioners have not in and by their said petition made or stated such a case as entitles them in a court of equity to any discovery or relief from or against this defendant touching the matters contained in the said petition, or any of such matters.

And for a further cause of demurrer this defendant shows:

1. That the relief prayed against this defendant in said [fol. 20] petition is not such a relief as the petitions are entitled to obtain in the matter of the application of Edward J. Haley and Mary A. Haley to register title to real estate;

2. That this defendant is not a proper or necessary party to a petition filed by the petitioners under said proceedings to compel the Registrar to cancel and remove the memorial of the transactions therein set forth;

3. That in said application to register title to real estate the petitioners are not entitled to any relief against this defendant in the form of an accounting as prayed in said petition, but that if the petitioners are entitled to any accounting from this defendant by reason of the allegations contained in said petition the remedy of the petitioners would be either the filing of a bill of complaint in a court of equity or the institution of a suit at law.

Wherefore, this defendant demurs to the said petition and to all the matters and things therein contained, and prays that the judgment of this Honorable Court whether he shall be compelled to make any further or other answer thereto and prays to be dismissed with his reasonable costs in this behalf sustained.

Noel State Bank. Charles F. Glaeser, Solicitor for Defendant.

I hereby certify that in my opinion the demurrer is well founded in point of law.

Charles F. Glaeser, Solicitor for Defendant.

[fols. 21 & 22] State of Illinois,
County of Cook, ss:

Charles F. Glaeser, being first duly sworn, on oath states that he is the solicitor for the above named defendant, and that the above demurrer is not interposed for delay, and in order that justice may be done.

Charles F. Glaeser.

Subscribed and sworn to before me this 31st day of August, A. D. 1926. Joseph G. Sheldon, Notary Public. (Seal.)

[fol. 23] IN CIRCUIT COURT OF COOK COUNTY

In Chancery

Case No. 11946. L. R.

In the Matter of the Application of EDWARD J. HALEY and MARY A. HALEY to Register Title to Real Estate

Petition of EDWARD ELIASON and ELIN ELIASON, his wife for Cancellation of Certain Certificates and Memorials

JUDGMENT—Oct. 22, 1926

This case coming on to be heard, upon the motion of Edward Eliason and Elin Eliason, his wife, petitioners, by McGilvray, Eames, Vaughan & Tilley, their solicitors, for leave to file instanter an amendment to their petition or bill of complaint herein, and it appearing to the court that the time heretofore granted by order of this court for filing such amendment has elapsed and that due notice of this motion has been given to the solicitors for all defendants who have appeared therein,

It is hereby ordered that said petitioners have leave to file instanter their sworn amendment to the petition or bill of complaint heretofore filed by them in this cause;

And said petitioners having filed said sworn amendment in open court, it is hereby ordered that the demurrers of the defendants, Charles Wilborn and Carrie S. Wilborn, [fol. 24] his wife, and Noel State Bank, a corporation, heretofore filed to the original petition or bill of complaint herein, stand as demurrers to said petition or bill of complaint as amended.

And now this cause coming on to be heard upon the petition or bill of complaint, as amended, of Edward Eliason and Elin Eliason, his wife, and upon the demurrer of the defendants, Charles Wilborn a. d Carrie S. Wilborn, his wife, to said petition as amended and upon the demurrer of Noel State Bank, a corporation, to said petition as amended, and the Court having heard arguments of counsel and being sufficiently advised in the premises,

It is hereby ordered that said demurrers and each of them to said petition or bill of complaint as amended, be and they are hereby sustained.

Whereupon, said petitioners, Edward Eliason and Elin Eliason, his wife, electing in open court to stand by their said petition or bill of complaint as amended,

It is hereby ordered that said petition or bill of complaint as amended be and the same is hereby dismissed at said petitioner's costs.

Whereupon, the said petitioners, Edward Eliason and Elin Eliason, his wife, pray an appeal from said order so sustaining said demurrers and dismissing said petition as amended, to the Supreme Court of the State of Illinois, which appeal is hereby allowed upon said petitioners' filing their appeal bond in accordance with the statute in the penal sum of three hundred dollars ($300.00) within 20 days from this date.

Enter.

Francis S. Wilson, Judge.

[fol. 25] In Circuit Court of Cook County

[Title omitted]

Amendment to Petition—Filed Oct. 22, 1926

Now come Edward Eliason and Elin Eliason, his wife, petitioners in the above entitled cause, and by leave of court first had and obtained, amend their certain petition or bill of complaint heretofore filed herein in the following respects, viz: By adding to and inserting in said petition or bill of complaint, after the last paragraph on page 6 thereof, and before the first paragraph on page 7 thereof, the following additional paragraph:

"Your petitioners further show that prior to the issuance by said Registrar of Titles of the said certificate of title to the said Charles Wilborn and Carrie S. Wilborn, his wife, being Certificate No. 175,048, the said defendants, Charles Wilborn and Carrie S. Wilborn, his wife, had ac-

[fols. 26-32] tual Notice and knowledge of the claim of your petitioners that the said warranty deed purporting to be signed by your petitioners and the said assignment of vendor's interest in the contract of sale, purporting to be signed by your petitioners, were in fact not signed, exe-

cuted or acknowledged by your petitioners and that each of them was in fact a forgery and of no effect in law."

Edward Eliason, Elin Eliason. McGilvray, Eames, Vaughan & Tilley, Solicitors for petitioners.

Duly sworn to by Edward Eliason and Elin Eliason. Jurat omitted in printing.

[fol. 33] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 34] In Supreme Court of Illinois, February Term, A. D. 1927

In the Matter of the Application of Edward J. Haley and Mary A. Haley to Register Title to Real Estate

Edward Eliason and Elin Eliason, Appellants,

vs.

Charles Wilborn, Carrie S. Wilborn, and Noel State Bank, a Corporation, Appellees

Appeal from Circuit Court Cook County, Honorable Francis S. Wilson, Judge

Assignment of Errors

Now come Edward Eliason and Elin Eliason, appellants and petitioners below and say that in the record of the proceedings in the above entitled cause and in the rendition of the judgment and decree in this cause there is manifest error in this, to-wit:

(1) The court erred in sustaining the demurrer of Charles Wilborn and Carrie S. Wilborn to the amended petition of Edward Sliason and Elin Eliason.

(2) The court erred in sustaining the general demurrer of Noel State Bank, a corporation, to the amended petition of Edward Eliason and Elin Eliason.

(3) The court erred in sustaining the special demurrer of Noel State Bank, a corporation, to the amended petition of Edward Eliason and Elin Eliason.

(4) The court erred in sustaining the general and special demurrer of Noel State Bank, a corporation, to the amended petition of Edward Eliason and Elin Eliason.

[fols. 35-37] (5) The court erred in not overruling the demurrer of Charles Wilborn and Carrie S. Wilborn to the amended petition of Edward Eliason and Elin Eliason.

(6) The court erred in not overruling the general and special demurrers of Noel State Bank, a corporation, to the amended petition of Edward Eliason and Elin Eliason.

(7) The court erred in dismissing the amended petition of Edward Eliason and Elin Eliason.

(8) The court erred in entering a decree or judgment for costs against petitioners, Edward Eliason and Elin Eliason.

(9) The order and decree of the court sustaining said demurrers dismissing said petition and entering judgment against the petitioners for costs was contrary to the law in the case.

by reason whereof, the said appellants, Edward Eliason and Elin Eliason, petitioners below, pray that said order and decree may be reversed and said cause remanded.

Edward Eliason and Elin Eliason, by McGilvray, Eames, Vaughan & Tilley, Their Attorneys and Solicitors.

[fols. 38-49] Minute entry of argument and submission February 15, 1927, omitted in printing.

[fols. 50 & 51] In Supreme Court of Illinois

[Title omitted]

Order Granting Rehearing—Dec. 7, 1928

And now on this day the Court having duly considered the petition for rehearing filed herein and the Court being

now advised in the premises doth allow the prayer for petition for rehearing of this cause.

[fols. 52-54] Minute entry of submission December 19, 1928, omitted in printing.

[fol. 55] In Supreme Court of Illinois

Docket No. 18143—Agenda 54—February, 1927

Edward Eliason et al., Appellants,

v.

Charles Wilborn et al., Appellees

Per Curiam:

An opinion in this cause was filed at a former term of this court. A petition for rehearing was filed and allowed. Upon further consideration the court adheres to the conclusions reached in that opinion and it is re-adopted and re-filed.

Opinion—Filed June 19, 1929

Mr. Commissioner Partlow reported this Opinion:

Appellants, Edward Eliason and Elin Eliason, his wife, filed their petition in the circuit court of Cook county under sections 93 and 94 of the Torrens act, against appellees, Charles Wilborn, Carrie S. Wilborn and the Noel State Bank, also Joseph F. Haas, as registrar of titles of Cook county, and Jerome C. Napletone, to cancel two certificates of title and for other relief. A demurrer was sustained to the petition as amended, it was dismissed for want of equity, and an appeal has been prosecuted to this court.

The petition sets out the following facts: On August 6, 1921, the title to the real estate was registered in Edward J. Haley and Mary A. Haley, his wife, and a certificate of title was issued to them. By mesne conveyances the title became vested in appellants and a certificate registering the

title in them was issued by the registrar on September 21, 1923. On April 1, 1926, they entered into a written contract to sell the real estate to George B. and Pearl A. Kennedy, and the purchasers went into possession, have remained in possession since that time and have made all payments as provided in the contract. In May, 1926, appellants entered into negotiations with Jerome C. Napletone to sell the premises to him, subject to a mortgage for $2,700, and the contract of sale was to be assigned by them to Npletone. Appellants delivered to Napletone the contract of sale and their certificate of title to the premises. From May 18, 1926, until June 18, 1926, appellants constantly endeavored to obtain from Napletone either the amount which he was to pay for the premises, or to obtain from him the certificate of title and the contract of sale, but they were unable to get any settlement out of him. On June 19, 1926, they found the office of Napletone closed and were informed that he had defrauded various people in Chicago and had fled from the State. They then went to the office of the registrar of titles of Cook county and learned that Napletone on May 19, 1926, had deposited with the registrar the certificate of title of appellants, together with a pretended warranty deed from them to Napletone dated May 18, 1926, acknowledged before John Boyle, a notary public of Cook county, and filed on May 19, 1926, [fol. 56] and on the same day, upon application of Napletone, a certificate showing title in him, subject to the mortgage of $2,700, was issued by the registrar. The warranty deed purporting to be signed by appellants and conveying title to Napletone was a forgery. Appellants interviewed Boyle, who took the acknowledgment, and Boyle stated that he never before had seen appellants or either of them; that the persons who acknowledged the deed were introduced to him under the names of appellants; that they were not appellants but were persons unknown to Boyle. A warranty deed from Napletone to Charles Wilborn and Carrie Wilborn, his wife, dated May 24, 1926, acknowledged before Julie V. Bahr, a notary public, was filed for record on May 29, 1926. Appellants alleged that they are not informed whether this deed was the actual deed of Napletone and bore his genuine signature, but even if the signature thereto was genuine the deed was a nullity and ineffective to convey title because the grantor therein had no title. At the

time appellants learned of the recording of these two deeds no certificate had been issued by the registrar to the Wilborns but application had been made therefor. Appellants protested to the registrar against issuing such a certificate and notified him of the forgery of the deed from appellants to Napletone, but the registrar on May 29, 1926, issued a certificate to the Wilborns. At the time of the execution of the purported deed from Napletone to the Wilborns, Napletone delivered to the Wilborns the contract of sale, together with a purported assignment thereof to him from appellants dated May 18, 1926, and acknowledged before Boyle as a notary public. The signatures of appellants to this assignment were forged. Boyle stated to appellants that the persons who acknowledged the assignment were the same persons who acknowledged the pretended deed from appellants to Napletone and that they were not appellants. Napletone also delivered to the Wilborns an assignment of the contract of sale from him to the Wilborns. The contract of sale is now held by the Noel State Bank for collection, together with the two purported assignments thereof. Appellants made application to the registrar to cancel the record of the two deeds, the certificate issued to Napletone, the certificate issued to the Wilborns, and asked that a certificate be issued to appellants showing title in them, but the registrar refused so to do.

A demurrer was filed to the petition, whereupon appellants filed an amendment, in which they alleged that prior [fol. 57] to the issuance of the certificate to the Wilborns the Wilborns had actual notice and knowledge of the claim of appellants that the warranty deed purporting to be signed by them, and the assignment of the contract of sale purporting to be signed by them, were in fact not executed or acknowledged by them, and that each of them was a forgery and of no effect in law.

The prayer of the petition was that the two purported warranty deeds and the assignments of the contract be declared null and void; that the registrar be ordered to cancel and annul the certificates issued to Napletone and the Wilborns; that the Wilborns and the Noel State Bank be ordered to deliver to appellants the contract of sale, to account to appellants for any money paid by the purchasers under the contract, and that the assignments of the contract be held to be null and void; that the title be vested

in appellants free of all liens and encumbrances except such as appear upon the certificate issued to them, subject to the mortgage of $2,700 and subject to the rights of the Kennedys under their contract of sale. After the petition was amended another demurrer was filed, which was sustained, a decree was entered dismissing the petition for want of equity, and this appeal followed.

It is contended by appellants that a grantee in a forged deed takes no title; that sections 40 and 42 of the Torrens act do not by their terms include registered titles based upon forged deeds; that fraud and forgery, within the meaning of the law, are two separate and distinct things; that inasmuch as the act makes no reference or provision as to the effect of forgery upon the title of registered owners, the general principle of law prevails that no valid title can be based upon a forged deed, and that if these sections are otherwise construed they are unconstitutional.

The last part of section 40 of the Torrens act provides: "The registered owner of any estate or interest in land brought under this act shall, except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all others except: (1) Any subsisting lease or agreement for a lease for a period of not exceeding five years, where there is actual occupation of the land under the lease. The term lease shall in- [fol. 58] clude a verbal letting. (2) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed. (3) Such right of appeal, writ of error, right to appear and contest the application, and action to make counter-claim as is allowed by this act." Section 42 is as follows: "Except in case of fraud and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same from the registered owner shall be held to inquire into the circumstances under which, or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand

or interest; and the knowledge that any unregistered lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

Fraud is the only exception mentioned in the statute where the certificate does not carry with it a good title. In cases of fraud the title is good in the hands of a bona fide purchaser for value. If forgery is not a species of fraud, as contended by appellants, then the statute by its terms makes the certificate the basis of a good title even in cases of forgery. Appellants in their brief say that "undoubtedly forgery is a species of fraud, yet the term 'fraud' is used constantly in statutory enactments and in opinions by the courts of this State as a basis for decisions which would be impossible if the documents in question were forgeries." While it is true there is a distinction between fraud and forgery, and forgery contains some elements that are not included in fraud, yet all forgeries are a species of fraud. The Century Dictionary defines fraud as "an act or course of deception deliberately practiced with the view of gaining a wrong or unfair advantage; deceit; trick; and artifice by which the right or interest of another is injured." In Story's Equity Jurisprudence (vol. 1, secs. 186, 187,) it is stated that fraud, in its general sense, comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another. This definition is approved in Diversey v. Johnson, 93 Ill. 547, and 26 Corpus Juris, 1059. Bouvier's Law Dictionary (vol. 1, p. 843,) states that active and positive fraud includes cases of the intentional and successful employment of any cunning, deception or artifice to circumvent, cheat or deceive another. Forgery is the fraudulent making or altering of a writing with the intent to prejudice [fol. 59] the rights of another. (People v. Meyer, 289 Ill. 184.) Every forgery includes acts and courses of deception deliberately practiced with a view of gaining a wrong or unfair advantage. It includes deceit, trick or artifice used to circumvent, cheat or deceive another. A fraud may be perpetrated by means of a forgery as well as by any other form of deception. The term "fraud," as used in the statute, is not limited to any particular kind of fraud but covers fraud of every kind and description, and therefore includes forgery. The petition did not allege that the Wilborns were

not purchasers for value, nor did it allege that they had notice of the forgeries prior to the date of their deeds from Napletone. In these respects the petition was defective and was subject to demurrer. It did allege that the Wilborns had notice of the forgery prior to the time the title was registered in them, but this allegation was not sufficient to entitle appellants to relief. Napletone did not take a good title under his certificate because he was a party to the forgery, but if the Wilborns were purchasers for value in good faith they were not required to inquire prior to the date of the certificate to Napletone, and they took a good title unless the statute is unconstitutional.

Appellants insist that if this construction is placed upon the statute it is unconstitutional, for the reason that it is in violation of section 2 of article 2 of the State constitution and the fifth amendment to the Federal constitution, which provide that no person shall be deprived of life, liberty or property without due process of law. The principal grounds for claiming that the statute is unconstitutional are, that there is no provision in it for notice to appellants so they could have the opportunity to appear and defend their title, and that because no opportunity was given them to defend they were deprived of their property without due process of law.

In determining whether the statute is unconstitutional its various provisions must be considered as a whole. The act is optional in the various counties of the State. It is not compulsory in any county and can only become operative by a vote of the people, as provided in section 110. After it has been adopted by a county it is not compulsory as to any person owning land in the county. No one is required to register his land unless he sees fit to do so. When an owner brings his land under the act he presumptively does so with notice of all of its provisions and requirements, including its rights, privileges and obligations. [fol. 60] When he does voluntarily submit his land to the operation of the act he has no cause to complain that the act is unconstitutional. (Victor Chemical Works v. Industrial Board, 274 Ill. 11; Dietz v. Big Muddy Coal Co., 263 id. 480; Crooks v. Tazewell Coal Co., 263 id. 343; Deibeikis v. Link-Belt Co., 261 id. 454.) Under section 46, when land is registered there is an implied agreement, which runs with the

land, that the same shall be subject to the terms of the act and to all amendments and alterations thereto. Upon the original application to register, the statute requires that all persons interested or in possession shall be made parties defendant; that there shall be personal service or service by publication on all defendants; that there shall be a full and complete hearing, with ample opportunity to all parties to present and preserve their rights. Section 36 provides for the preservation with the registrar of the original certificate of title issued and the delivery of a duplicate certificate to the applicant. Section 37 provides for the preservation of the evidence of the handwriting of the holder of the duplicate certificate, and that his receipt therefor, in his handwriting, shall be prima facie evidence of the genuineness of his signature. After the hearing, if a certificate is granted, the effect of such certificate is specified in sections 40 and 42 above noted.

The land in this case was first registered in the names of the Haleys and a certificate was issued to them. When appellants bought it they knew the title had been registered, and they took it subject to all of the rights, privileges and obligations of such registration and the law applicable thereto. They were under no obligations to buy, but when they did buy and registered their title they came under all of the provisions of the act and were presumed to know all of its terms. The title was registered in appellants under section 47, which provides that when a registered owner desires to sell his land he may transfer it by deed, and upon filing the deed in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferor has the title proposed to be transferred, he shall issue and register a new certificate in the name of the applicant. After the title was registered in appellants it could not be registered in Napletone until the duplicate certificate to appellants was surrendered to the registrar. If section 47 had been complied with it would have been impossible for Napletone to have accomplished this fraud. The act erected a [fol. 61] safeguard against a forged transfer being registered, by the requirement that no transfer should be registered unless the owner's certificate was produced along with the instrument of transfer. Section 101 provides that any

person wrongfully deprived of any land through the bringing of the same under the provisions of the act or by the registration of any other person as owner of such land, the person who is barred or who in any way is precluded from bringing an action for the recovery of such land shall have a right of action for damages against the county and may file a claim with the county board or bring an action at law for the recovery of such damages. In Board of Education v. Blodgett, 155 Ill. 441, it was held that the deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away.

Many States and foreign countries have statutes similar to ours which have been in force for many years. Appellees cite cases from Australia, New Zealand and Canada where it has been held that the registration of a title based upon a forged deed is not good in favor of a party to the forgery but is good in favor of a bona fide purchaser for value. (Anderson v. Davy, 1 N. Z. L. 302; Whakaruru v. Public Trustee, 12 id. 651; Fawkes v. Attorney General, 6 Ont. L. 490.) In Thom on Canadian Torrens System it is said (p. 192): "It has never been disputed, however, that while a certificate of title issued on forgery may not be good in favor of the owner through the forgery even though bona fide and for value, the real person holding such certificate of title may transfer a good title to a third person." In Hogg on Registration of Title to Land Through the Empire it is said (p. 142): "Forgery, of course, necessarily implies fraud. Cases of forgery, however, strongly illustrate the conclusive effect of registration of a bona fide purchaser for value from a vendor whose registration has been procured by fraud. Such a purchaser's title may be upheld even where his vendor (the previous registered owner) has been registered by means of his own forgery—that is, has been himself the forger and not merely the victim of another person's forgery." Niblack, in his Analysis of the Torrens Systems, at page 201 says: "Unless otherwise provided in a Torrens act, the rule in case of forgery may be stated as follows: The registration of a forger, or of a person in good faith and for value as the result of a forgery, or of a person claiming under [fols. 62 & 63] either of them without a valuable considera-

tion paid in good faith, may be set aside, but the registration of a person for value in good faith, claiming under any one of these, will hold the title as against the former registered owner who is the victim of the forgery, and all claiming under him. A forged transfer or mortgage will become the root of a valid title." The author of this work was a member of the Chicago bar and the work relates primarily to the Illinois act.

Section 34 of the California statute, passed in 1897, is similar to the first part of section 40 of our statute above quoted. Section 36 of the California statute is identical with section 42 of our statute. Section 37 provides that in case of fraud the registration shall not be good in favor of the persons who perpetrated the fraud but is good as to subsequent purchasers for value in good faith. Section 38 makes the same provision as to forgery that section 37 makes as to fraud. Several States have provisions similar or identical with sections 40 and 42. Most of these statutes have been in force for many years, and no case is cited where any of them have been held to be unconstitutional on the grounds here urged by appellants.

Forgery is included in the term "fraud" as used in the statute. The statute is not unconstitutional because it deprived appellants of the title to their property without due process of law. It makes ample provision for the protection of all persons interested. Appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute.

The demurrer to the petition was properly sustained, and the decree will be affirmed.

Per CURIAM:

The foregoing opinion reported by Mr. Commissioner Partlow is hereby adopted as the opinion of the court, and judgment is entered in accordance therewith.

Decree affirmed.

Mr. Justice Heard, dissenting.

[fol. 64] IN SUPREME COURT OF ILLINOIS

No. 18143

EDWARD ELIASON and ELIN ELIASON, Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN, and NOEL STATE BANK, a Corporation, Appellees

JUDGMENT—June 19, 1929

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Decree of the Circuit Court aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellees recover of and from the said Appellants costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 14th day of August, in the year of our Lord one thousand nine hundred and twenty-nine.

Chas. W. Vail, Clerk of the Supreme Court. (Seal of the Supreme Court. State of Illinois, Aug. 26, 1818).

[fols. 65 & 66] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 67] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Aug. 13, 1929

Considering themselves aggrieved by the final decision and judgment of the Supreme Court of the State of Illinois in the above entitled cause, which such judgment was rendered by that Court on June 19, 1929, the Appellants therein, Edward Eliason and Elin Eliason, hereby pray that they be allowed an appeal herein from the said decision and judgment of the Supreme Court of Illinois to the Supreme Court of the United States, and for an order fixing the amount of the bond thereon, in order that they may bring up for review before the Supreme Court of the United States the said decision and judgment of the Supreme Court of Illinois.

Appellants accompany this petition with an assignment of errors and prayer for reversal, in accordance with the Revised Rules of the Supreme Court of the United States, effective July 1, 1928.

This case is one in which, under legislation in force when the Act of January 31, 1928, was passed by the Congress [fol. 68] of the United States, a review could be had in the Supreme Court of the United States on writ of error under Section 237 of the Judicial Code. The case is one in which there is drawn in question the validity of a statute of Illinois on the ground of its being repugnant to the Constitution of the United States, and the decision of the State Supreme Court was in favor of the validity of this statute.

On January 12, 1927, Appellants filed in the Circuit Court of Cook County, Illinois, under and pursuant to the provisions of Sections 93 and 94 of "An Act concerning land titles", commonly known as the Torrens System of land registration, (Cahill's Ill. Rev. Stats., Chap. 30, Pars. 49 to 153) their petition in equity to cancel two certificates of

title covering lands owned by Appellants which had been issued by the Registrar of Titles, the first certificate being based on a forged deed purporting to have been made by Appellants to one Jerome C. Napletone, and the other upon a deed from said Napletone to Appellees, the Wilborns, under which deed the Wilborns claim title.

As shown by said petition, title to the real estate was originally registered under said Act in Edward J. Haley and wife on August 6, 1921. By mesne conveyances the title subsequently became vested in Appellants and a certificate of title in them was issued by the Registrar under said Act on September 21, 1923. In May, 1926, Napletone, upon fraudulently obtaining possession of Appellants' certificate of title, forged Appellants' signatures to a deed from Appellants to himself, which deed he filed with the Registrar and obtained thereon a certificate of title in himself. A few days thereafter Napletone conveyed the land to Appellees, Wilborns, who bought without notice of the [fol. 69] forgery, and who, thereafter, and after notice of the forgery, filed their deed with the Registrar and obtained from him a new certificate of title, based on the deed from Napletone to them, Napletone's title being based on the forged deed purporting to have been made by Appellants. It is these two last mentioned certificates of title which Appellants sought to have cancelled and removed as clouds on their title.

A demurrer was sustained to the petition and it was dismissed and judgment for costs entered in the trial court against Appellants in favor of Appellees, from which judgment Appellants took an appeal to the Supreme Court of Illinois, that being the highest court in that State in which a final decision in the case could be had.

The Supreme Court of Illinois by an opinion handed down October 25, 1928, (October Term) affirmed the judgment of the Circuit Court and rendered judgment for costs against Appellants.

Appellants thereupon filed a petition for rehearing, which was allowed, and the cause was reconsidered by the Supreme Court at the June Term, 1929, at which term, on June 19, 1929, that Court adhered to the conclusions reached in its former opinion and readopted and refiled its former

opinion, which opinion was written and reported by Mr. Commissioner Partlow.

The two controlling questions presented and argued on the appeal before the Supreme Court of Illinois, both of which were considered and decided by that Court, were:

First. Whether or not the statute (Secs. 40 and 42 of the Torrens Act) includes by its terms registered titles based on forged deeds, that is, whether the statute makes a certificate of title issued by the Registrar and based on a forged [fol. 70] deed conclusive evidence of title in favor of a purchaser without notice. The Supreme Court decided that it did and so construed the statute.

Second. Whether or not, as so construed, the statute violates due process of law and is repugnant to the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Illinois sustained the validity of the statute as construed by that Court, and held that it is not repugnant to the Constitution of the United States and did not deprive Appellants of their property without due process of law. This is the only ground upon which the judgment of that Court, in affirming the judgment of the trial court, can rest.

The Federal question involved was duly presented and raised by Appellants in the Supreme Court of Illinois. The question was argued in the briefs of counsel and in Appellants' petition for rehearing, which petition was granted and the cause reconsidered thereon by the Court, and the Court in its opinion considered and decided the question.

Wherefore petitioners pray that an appeal may be al- [fols. 71 & 72] lowed herein from the said decision and judgment of the Supreme Court of Illinois, and that petitioners may have such other and further relief in the premises as may be just.

Edward Eliason, Elin Eliason, by Matthias Concannon, Their Attorney. Matthias Concannon, Counsel for Appellants, 69 W. Washington St., Chicago, Illinois.

Read on application for appeal August 12", 1929. Appeal allowed as prayed to the Supreme Court of the United States upon filing appeal bond in the sum of $1,000.00. Citation returnable September 12, 1929.

William M. Farmer, Chief Justice of the Supreme Court of Illinois.

[File endorsement omitted.]

[fol. 73] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Aug. 13, 1929

And now come Edward Eliason and Elin Eliason, Appellants, and assign the following errors in the record and proceedings in the said cause:

1. The Supreme Court of the State of Illinois erred in holding that Sections 40, 42 and 46 of the statute of the State of Illinois, entitled, "An Act concerning land titles," approved and in force May 1, 1897, as amended, (Laws 1897, p. 141; Cahill's Ill. Rev. Stats. 1927, Chap. 30, pars. 88, 90 and 94), as construed and applied to appellants by that Court in this case were valid and not in contravention of the Constitution of the United States.

2. The Supreme Court of the State of Illinois erred in holding that the said statute of the State of Illinois, as construed and applied to appellants by said Court in this case, did not deprive the Appellants of their property without [fol. 74] due process of law and did not deny to appellants the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Illinois erred in holding that Appellants, by voluntarily purchasing lands registered under the said statute of Illinois, cannot complain that any of the provisions of said statute operate to deprive them of their property without due process of law or to deny to them the equal protection of the laws contrary to

the provisions of the Fourteenth Amendment to the Constitution of the United States.

4. The Circuit Court of Cook County, Illinois, erred in holding that the certificate of title issued by the Registrar of Titles of Cook County, Illinois, to Jerome C. Napletone, based on a forged deed purporting to have been made by Appellants to said Napletone, as grantee, and the certificate of title issued by said Registrar to Charles Wilborn and Carrie S. Wilborn, Appellees, were conclusive evidence of title against Appellants and in favor of Appellees and in dismissing said petition or bill of complaint of Appellants and entering judgment for costs against Appellants. In so holding and entering judgment, as aforesaid, said Court deprived Appellants of their property without due process of law and denied to Appellants the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Illinois erred in holding that the certificate of title issued by the Registrar of Titles of Cook County, Illinois, to Jerome C. Napletone, based on a forged deed purporting to have been made by [fols. 75 & 76] Appellants to said Napletone, as grantee, and the certificate of title issued by said Registrar to Charles Wilborn and Carrie S. Wilborn, Appellees, were conclusive evidence of title against Appellants and in favor of Appellees and in affirming the judgment and decree of the Circuit Court of Cook County, Illinois, and entering judgment for costs against Appellants. In so holding and entering judgment, as aforesaid, said Court deprived Appellants of their property without due process of law and denied to Appellants the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

For which errors the Appellants pray that the said judgment and order of affirmance of the Supreme Court of Illinois, rendered June 19, 1929, in the above entitled cause, and also the judgment of said Circuit Court of Cook County, Illinois, rendered October 22, 1926, in said cause,

be reversed and that said cause be remanded for further proceedings in accord with the rights of Appellants.

Matthias Concannon, Counsel for Appellants, 69 West Washington Street, Chicago, Illinois.

Read on application for appeal to the Supreme Court of the United States August 13," 1929.

William M. Farmer, Chief Justice of the Supreme Court of Illinois.

[File endorsement omitted.]

[fols. 77-79] Bond on appeal for $1,000, approved and filed August 13, 1929, omitted in printing.

[fols. 80 & 81] Citation, in usual form, showing service on Charles F. Glaeser and Joseph G. Sheldon, filed August 13, 1929, omitted in printing.

[fol. 82] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PRÆCIPE FOR RECORD—Filed Aug. 13, 1929

To Charles W. Vail, Clerk of the Supreme Court of Illinois:

You will please prepare a true, full and complete transcript of the record and proceedings in the case of Edward Eliason and Elin Eliason, Appellants, vs. Charles Wilborn, Carrie S. Wilborn and Noel State Bank, a corporation, Appellees, No. 18143, and also of the opinion of the Court rendered therein, as the same appears of record in your office.

Matthias Concannon, Counsel for Appellants.

Received a copy of the foregoing Prænipe for Record this 13th day of August, 1929.

Charles F. Glaeser, Joseph G. Sheldon, Counsel for Appellees.

[File endorsement omitted.]

[fol. 83] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 84] Clerk's return omitted in printing.

[fol. 85] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS INTENDED TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 28, 1929

The following are the points on which the Appellants intend to rely to obtain a reversal of the judgment appealed from, namely:

1. The statute of the State of Illinois, entitled, "An Act concerning land titles," approved and in force May 1, 1897, as amended, (Laws 1897, p. 141; Cahill's Ill. Rev. Stats. 1927, Chap. 30, pars. 88, 90 and 94,) as construed and applied to appellants by the Supreme Court of that State, is invalid, because repugnant to the Constitution of the United States, and because it deprives appellants of their property without due process of law and denies to appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Appellants, by voluntarily purchasing lands registered under said statute, are not precluded from complaining that the provisions of said statute, as construed and ap-[fol. 86] plied by the Supreme Court of Illinois, operate to deprive them of their property without due process of law and to deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and the decision of the Supreme Court of Illinois holding that appellants are so precluded, deprives appellants of their property without due process of law and denies to them the equal protection of the laws, in violation of said Fourteenth Amendment.

3. The Circuit Court of Cook County, Illinois, and the Supreme Court of that State, in holding that the certificate of title issued by the Registrar of Titles of Cook County, Illinois, to Jerome C. Napletone, based on a forged deed purporting to have been made by appellants to said Napletone, as grantee, and the certificate of title issued by said Registrar to Charles Wilborn and Carrie S. Wilborn, appellees, were conclusive evidence of title against appellants and in favor of appellees, deprived appellants of their property without due process of law, and denied to appellants the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Appellants respectfully represent that the whole of the record as filed, except the parts thereof herein directed to be omitted in printing, is necessary for the consideration of the case, and the Clerk will please print the whole record, except the following designated parts thereof, which shall [fol. 87] be omitted in printing, viz.:

	Record page
1. Notice of motion to set Demurrer for argument	21
2. Motion to Amend	22
3. Appeal Bond	27–30
4. Notice of Præcipe for Record	31
5. Præcipe for Record	32–33
6. First Opinion, Partlow, Commissioner	41–48

Matthias Concannon, Counsel for Appellants, 69 W. Washington St., Chicago, Illinois.

Received a copy of the above and foregoing statement this 26th day of August, 1929.

Counsel for appellees do not intend to designate any additional parts of the record to be printed, and consent that the record may be printed as directed with the above designated parts omitted.

Charles F. Glaeser, Joseph G. Sheldon, Counsel for Appellees, 19 S. LaSalle St., Chicago, Illinois.

[fol. 88] [File endorsement omitted.]

FILE COPY

SEP 21 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION ON APPEAL.

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel

BARNARD & MILLER PRINT, CHICAGO

(34,478)

SUBJECT INDEX.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929

No. 347.

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represent:

A.

Statutory provision sustaining jurisdiction.

The case is one in which there is drawn in question the validity of a statute of Illinois on the ground of its being repugnant to the Fourteenth Amendment to the Constitu-

tion of the United States. The judgment of the Supreme Court of Illinois, which is the highest court of that state in which a decision in the suit could be had, sustained the validity of the statute. The case is therefore one which was subject to review in this Court on writ of error under Section 237 of the Judicial Code as amended (United States Code, Title 28, Sec. 344) under legislation in force when the Act of January 31, 1928, was passed, which substituted appeal for writ of error. (United States Code, Title 28, Secs. 861a, 861b.)

B.

Date of judgment and date of application for appeal.

The judgment sought to be reviewed was entered on June 19, 1929. (Rec., 26.)

The application for appeal was presented and allowed on August 13, 1929. (Rec., 30.)

C.

Nature of case and ruling below.

Appellants have filed with the clerk of this court, as appendices to this statement, authenticated copies of appellants' reply brief and petition for rehearing filed below, in order to show with greater certainty that the federal question raised on this appeal was timely presented. (Appendices: Reply Brief, 8, 9; Petition for Rehearing, 7, 8, 9.) We think this sufficiently appears from the opinion itself (Rec., 22), but in view of the inadvertent reference in that opinion to the *Fifth* Amendment to the Federal Constitution (Rec., 22), and to save any question, we thought best to bring to the attention of this court, in the manner indicated, the fact that appellants urged below that the statute, as construed and applied to appellants by the state

court, is in violation of the *Fourteenth* Amendment to the Federal Constitution because it deprives them of their property without due process of law.

THE QUESTION INVOLVED.

The statute of the State of Illinois here involved is "An Act concerning land titles," approved and in force May 1, 1897, as amended, commonly known as the "Torrens System" of land registration. (Laws 1897, p. 141; Cahill's Ill. Rev. Stats. 1927, Ch. 30.) The pertinent sections are hereinafter set out. (*Infra*, pp. 7-8.) The federal question presented on this appeal is whether that statute, as construed and applied in this case to appellants by the Supreme Court of that state, and which, as so construed, makes a certificate of title based on a forged deed and issued by the registrar of titles (a mere ministerial officer) without notice to the owner, conclusive evidence of title against such owner in favor of a purchaser from the grantee in the forged deed, deprives appellants of their property without due process of law and denies to them the equal protection of the laws, in violation of the Fourteenth Amendment of the federal Constitution.

HOW THE QUESTION ARISES.

Appellants, on July 30, 1926 (Rec., 1), filed their petition or bill in equity in the Circuit Court of Cook County, Illinois, to cancel two certificates of title to lands owned by them which had been issued by the registrar of titles of said county without notice to appellants and the two deeds upon which such certificates were based. The first certificate was based on a forged deed purporting to have been made by appellants to one Jerome C. Napletone, and the other upon a deed from said Napletone to appellees, the Wilborns, under which deed the Wilborns claim title.

Appellants' petition was filed in accordance with the provisions of Sections 93 and 94 of said Torrens Act and as therein authorized. Those sections expressly authorize the filing of such a petition by any person interested in registered land to obtain a cancellation of any certificate of title, memorial or other entry upon the register improperly issued or made by the registrar of titles. The proceeding authorized is in the nature of a bill to remove and cancel a cloud on title to registered land.

A demurrer was sustained to the petition and it was dismissed at appellants' costs. Judgment was entered accordingly (Rec., 13) from which appellants appealed to the Supreme Court of Illinois, which is the highest court of review in that state.

The Supreme Court of Illinois, in an opinion first handed down October 25, 1928, affirmed the judgment of the trial court. (Certified Transcript of Rec., 38-49.) Thereupon, appellants filed their petition for a rehearing, which was allowed (Rec., 16), and the case was reconsidered by that court at the June Term, 1929, at which time, June 19, 1929, the court adhered to the conclusions formerly reached by it and (one of the Justices dissenting), readopted and refiled its former opinion, written by Mr. Commissioner Partlow (Rec., 17), and rendered judgment for costs against appellants in favor of appellees. (Rec., 26.)

The title to appellants' land, as shown by the pleadings (Rec., 1) was originally registered under said Torrens Act in Edward J. Haley and wife, on August 6, 1921. By *mesne* conveyances, the title afterwards became vested in appellants, to whom a certificate of title was issued by the registrar under said act, September 21, 1923. In May, 1926, Napletone, a stranger to the title, surreptitiously obtained from appellants their certificate of title and forged appellants' signatures to a deed purporting to be from appellants to himself, which deed, accompanied by said certificate of

title, he filed with the registrar and obtained thereon a certificate of title in himself. A few days thereafter, Napletone conveyed the land to appellees, the Wilborns, who bought without actual notice of the forgery. The Wilborns then filed their deed, together with the certificate of title issued to Napletone based on the forged deed, with the registrar and obtained from him, after notice of the forgery (Rec., 14), a new certificate of title showing title in themselves, based on the deed from Napletone. It is these two last mentioned certificates and deeds which appellants sought to have canceled and removed as clouds on their title.

QUESTIONS DECIDED BELOW.

Two questions which controlled the decision in the case were presented and argued on the appeal before the Supreme Court of Illinois and each of them was considered and decided by that court:

First. Whether or not the statute, when properly construed, makes a certificate of title issued by the registrar, based on a forged deed and without notice to the owner whose signature is forged, conclusive evidence of title as against the owner in favor of a purchaser without notice.

The court below decided that it did, and so construed and applied the statute.

Second. Whether or not, as so construed, the statute violates due process of law and is repugnant to the Fourteenth Amendment to the federal Constitution.

The court below sustained the validity of the statute, as thus construed, and held that the statute did not deprive appellants of their property without due process of law, upon the following grounds:

(a) That the Act makes provision for the protection of any person wrongfully deprived of his land by giving

him recourse to the "indemnity fund" provided by the Act, or an action against the county to recover his damages (Rec., 23-24); and (b) that when one voluntarily submits his land to the operation of the Act, as in the case of an original registrant, or purchases land already under the Act, as in the case of appellants, he thereby consents, pursuant to the condition imposed by Section 46 hereinafter quoted, to be bound by *all* of its terms and provisions and cannot complain that the Act or any part thereof is invalid as violative of any right under the federal Constitution. (Rec., 22-23.)

As pointed out later, neither of these grounds can be sustained under the decisions of this court.

The constitutional validity of the statute is the only ground upon which can rest the judgment of the court below and it is the only ground on which that court based its decision.

The court below made no attempt to uphold the constitutionality of this statute except upon the grounds hereinabove noted. Unless one or both of these grounds can be sustained, we submit that the statute is clearly invalid because it deprives appellants of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution.

PERTINENT SECTIONS OF THE STATUTE.

The Illinois Act is substantially in the same form as that adopted in a number of other states, which Act, in the main, is patterned after the Torrens System of land registration in force in parts of England, Australia, Canada and New Zealand.

The provisions relevant to the question at hand are as follows:

Section 40, (R. 20) which provides that the registered owner of any estate or interest in land brought under the Act shall, except in cases of fraud to which he is a party, hold the same subject to certain charges set forth in said section, and also subject "*only* to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and *free* from all others," with certain exceptions not material here.

Section 42, as follows:

> "Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

Section 46, as follows:

> "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

Section 47, (omitting immaterial parts) as follows:

> "A registered owner of land desiring to transfer his * * * interest therein * * * may execute to the intended transferee a deed or instrument of conveyance * * *. And, upon filing *such* deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title * * * he shall make out and register * * * a new certificate * * *."

Section 54, which provides that a deed of registered land

> "shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer * * * *upon compliance with the terms of this Act.* On the completion of such registration, the land * * * shall become transferred * * * according to the purport and terms of the deed * * * ."

Section 58, (omitting immaterial parts) as follows:

> "In the event of a duplicate certificate of title being lost, mislaid or destroyed, the owner * * * may make affidavit * * * and the registrar, if satisfied as to the truth of such affidavit and the *bona fide* of the transaction, shall issue to the owner a certified copy of the original certificate * * * and such certified copy shall stand in the place of and have like effect as the missing duplicate certificate."

Note: The statute makes no provision for notice or hearing before the registrar in the matter of the transfer of title and the issuance of a new certificate based on such transfer.

D.

Cases believed to sustain jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

I.

ON THE QUESTION WHETHER THE COMPENSATION PROVISION IN THE STATUTE, GIVING RECOURSE TO THE "INDEMNITY FUND" OR ACTION FOR DAMAGES AGAINST THE COUNTY, IS AN ANSWER TO THE CONSTITUTIONAL OBJECTION.

Cases holding that a state cannot take the property of one citizen and give it to another, even for a full compensation, except for a public use, viz.:

2 Cooley's Constitutional Limitations, 8th Ed., p. 1124, and the numerous cases there cited.

State v. Guilbert, 56 Oh. St. 575, 47 N. E. 551, 558, which involved the precise question.

II.

ON THE QUESTION WHETHER APPELLANTS ARE BOUND BY UNCONSTITUTIONAL PROVISIONS OF THE STATUTE ON THE GROUND OF THEIR SUPPOSED CONSENT.

Cases in which this court has held that no validity or effect can be given to any consent or agreement of a person to surrender a right or privilege secured to him by the Constitution and laws of the United States, made or implied in obedience to a statute which imposes such consent or agreement as a condition to the exercise of a right or privilege granted by such statute, viz.:

(a) Removal cases, involving validity of state statutes requiring foreign corporations to consent to waive right under the Constitution and laws of the United States to remove cases to federal court as a condition to obtaining permit to do a local business, viz.:

Southern Pacific Co. v. Denton, 146 U. S. 202, 207.

Barron v. Burnside, 121 U. S. 186, 200.

Barrow Steamship Co. v. Kane, 170 U. S. 100, 110, 111.

(b) Tax cases, requiring foreign corporations to pay unconstitutional tax or franchise fee for privilege of doing a local business, viz.:

Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 35-36.

Pullman Company v. Kansas, 216 U. S. 56, 63.

International Paper Co. v. Mass., 246 U. S. 135, 141.

Hanover Insurance Co. v. Harding, 272 U. S. 494, 507.

(c) California case in which the state required a *private* carrier to assume the duties of a *common* carrier as the price for the privilege of using state highways, viz.:

Frost & Frost Trucking Co. v. Railroad Commission of Calif., 271 U. S. 583, 592-599.

III.

THE DECISION OF THE ILLINOIS COURT IS BASED UPON A SUPPOSED CONSENT OF APPELLANTS, SAID TO BE IMPLIED FROM THE STATUTE (SEC. 46) THAT THE CERTIFICATE OF TITLE ISSUED BY THE REGISTRAR, BASED ON A FORGED DEED, SHALL BE CONCLUSIVE IN FAVOR OF A PURCHASER. WE CONTEND THAT NO SUCH CONSENT IS TO BE FOUND IN THE STATUTE.

(a) As to the right of this court to determine whether such consent has in fact been given, we cite:

N. Y. Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 186.

Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8.

(b) Such power must reside in this Court; otherwise the power of this court to prevent the infringement of the federal Constitution would be of no avail.

Delmas v. Insurance Co., 81 U. S. 661, 668.

Bridge Proprietors v. Hoboken Co., 68 U. S. 116, 145.

E.

Suggestions in support of jurisdiction.

This is the first instance under our form of constitutional government that a court of review has held that a person, through no fault or wrong of his own, may in virtue of a state statute have his property wrested from him by means of a forged deed.

The question which here arises for the first time was anticipated by Niblack in his "Analysis of the Torrens System," Sec. 135, p. 213. In there discussing the question whether under our federal Constitution a state may lawfully make a certificate of title based on a forged deed conclusive evidence of title against the rightful owner, on which question he expressed grave doubt, he said:

> "* * * but for the determination of this matter, and of many questions arising under the Torrens statutes, we must wait until the Supreme Court of the United States has rendered its decision."

The question is now before this Court, and an authoritative determination of the question is of public interest in every state where Torrens statutes are in force. It is a matter, we submit, of great public interest to know whether a state is free to insert any condition or provision it may see fit to impose in a Torrens statute, however unconstitutional it may be and however it may operate to deprive a person of his property without due process of law or to deny him the equal protection of the laws, and then say to the person aggrieved that because he has registered his land under the Act or has acquired title to land already registered, he has thereby consented that he may be so deprived of his property or be so denied the equal protection of the laws. If so, Torrens statutes may provide without limit that registered lands may be taken for public or private use without compensation or that such lands may be taxed without regard to any rule of uniformity, etc. And if this consent doctrine is applicable to a land registration statute it may be applied to all other subjects of legislation. The far-reaching effect of such a doctrine and the consequences to which it may lead are at once apparent.

The statute provides for neither notice nor hearing in the matter of transfer of title and the issuance by the registrar of a new certificate thereon. Under the construction

given the statute by the court below, a deed from the owner is not necessary—a forged deed is sufficient to authorize the registrar to act, and when he, a ministerial officer, without notice to the owner, issues a certificate of title to a supposed grantee, based on a forged deed or on a blank piece of paper or upon nothing at all, such certificate is made conclusive evidence of title against the owner in favor of a subsequent purchaser without notice.

The court below made no attempt to uphold the constitutionality of this statute except upon the grounds hereinabove noted. Unless one or both of these grounds can be sustained, we submit that the statute is clearly invalid because it deprives appellants of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution.

The opinion below states (Rec., 23) that, "The Act erected a safeguard against a forged transfer being registered, by the requirement [Section 47] that no transfer should be registered unless the owner's certificate was produced along with the instrument of transfer," and that (Rec., 23), "If section 47 had been complied with it would have been impossible for Napletone to have accomplished this fraud." Section 47 (*supra*, p. 7) also requires, in addition to the production of the duplicate certificate, that the owner's deed (*i. e.*, his own deed) be filed with the registrar as a condition precedent to his authority to make a transfer. This latter safeguard, the court holds is of no moment.

It is possible, of course, that if Napletone had not obtained from appellants their certificate of title he would not have succeeded in accomplishing this fraud, but that does not follow from any provisions or safeguards of the Act. The statute furnishes no protection to the owner against *any* unauthorized act of the registrar if it is to be

construed, as the lower court construed it, as making the certificate issued by him conclusive evidence of title in favor of a purchaser.

The statute would furnish a safeguard only in case the conclusiveness of the registrar's certificate were made dependent upon his *authorized* action under Section 47 in the two respects therein named, namely, the production of the outstanding duplicate certificate together with the owners' genuine deed, both of which are required by that section.

We have also made note above (p. 8) of Section 58 of the statute, which provides for the issuance of a certified copy of the certificate upon filing of affidavit of loss, etc., of the owner's duplicate original. Under this section, despite the utmost care and the actual possession of his certificate by the rightful owner, one intending to steal his land may forge an affidavit of loss, present it to the registrar and obtain a certified copy of the duplicate certificate which copy, under the statute, has "like effect as the missing duplicate certificate." He may then forge a deed from the owner, present it with the new certificate, have the transfer registered and, upon conveying to a purchaser ignorant of these facts, take the owner's property from him without notice and without his act, fault or knowledge. He may also accomplish the same result by forging an owner's duplicate certificate as well as the deed.

The other obvious reason why the retention by the owner of his duplicate certificate of title affords him no protection under this statute as construed by the court below is that if the registrar issues a new certificate of title to a grantee in a forged deed, or without any deed, and without the surrender or production of the outstanding duplicate certificate and without any affidavit being furnished as to its loss, a purchaser without notice from such grantee would get good title, and this in spite of the fact that the owner may have his duplicate certificate under lock and key.

If the owner is not protected against the unauthorized act of the registrar in issuing a certificate of title based on a forged deed, neither would the owner be protected against the unauthorized act of the registrar in issuing a new certificate without the production or surrender of the owner's duplicate certificate or affidavit as to its loss.

While the court below was in error in supposing that it was within the power of appellants under this statute to prevent this fraud by retaining possession of their duplicate certificate of title, nevertheless that court did not base its decision, independent of the statute, upon any equitable ground or principle of general or local law that appellants should lose their title because of any negligence or other act on their part in suffering their duplicate certificate to get out of their possession. The opinion contains no intimation that, independent of the provisions of Sections 40 and 42 (which sections as construed made the certificate issued to Napletone conclusive evidence of title in favor of appellees), the court would have decided adversely to appellants because they suffered Napletone to obtain possession of the duplicate certificate. To the contrary the opinion expressly states (Rec., 22) that the Wilborns "took a good title *unless the statute is unconstitutional.*" Therefore, the only ground on which rests the decision below is the constitutional validity of the statute as construed and applied in this case.

I.

The compensation provision is no answer to the constitutional objection.

One of the grounds on which the court below sustained the constitutional validity of the statute, viz., that the Act makes (or at least purports to make) provision for the protection of any person wrongfully deprived of his land by

giving him recourse to the "indemnity fund" or an action against the county to recover his damages, is no answer at all—for, as the taking of property by an unauthorized registration or wrongful transfer is for a private use, the provision for compensating the injured owner in no way legalizes the taking.

The state cannot take the property of one person and give it to another, *even for a full compensation,* except for a public use.

As said in the Ohio case above cited, which involved the constitutionality of a section of the Ohio Torrens Act and the effect of the provision remitting the injured party to the indemnity or assurance fund:

> "But property in all of its subjects is equally sacred under the protection of this section of the bill of rights. To permit its abrogation would equally expose all descriptions of property to spoliation. The section is an inviolable assurance to all owners of land and chattels that, unless they are required for a public use, they may retain them in specie, placing upon them any estimate that may be suggested by judgment, sentiment or caprice; and it is not within the combined authority of the departments of the government of the state to say that the estimate is too high. * * *
>
> The terms of these sections of the act show that the fund is to be raised to indemnify those whose lands have been wrongfully wrested from them, under the earlier provisions of the act, and without due process of law. When the provisions of the constitution are applied to this penitential scheme, it at once becomes apparent that it is both inadequate and forbidden."

The provision for compensation may protect the *purchaser* who relies on the certificate of title. In his case no constitutional rights are impaired and he has no cause to complain if he recovers his damages caused by the error or wrongful act of the registrar. But not so with the owner whose property is arbitrarily taken from him without due

process of law and given to another. Compensation by way of damages is no justification in his case. He has a constitutional right to retain his property in specie—his home, for example—and it cannot be taken from him, "even for full compensation, except for a public use."

II.

Appellants are not bound by unconstitutional provisions of the statute because of their supposed consent.

The second ground, viz., that appellants are precluded from questioning the validity of the statute because of their consent to be bound by *all* of its terms under the condition imposed by Section 46 above quoted (p. 7) and which consent is said to be implied from their having purchased lands registered under the Act, involves the right of a state indirectly to impair constitutional guaranties by compelling a person to elect either not to exercise a right or privilege at all (in this case, the right or privilege to purchase and own registered lands) or, as the price to be paid for exercising such right or privilege, to waive the protection of the Fourteenth Amendment and consent to be bound by a statute which deprives him of his property without due process or denies to him the equal protection of the laws. The holding of the lower court on this point is contrary to the principle announced by this Court in the cases above cited.

The law as announced in these cases is that no validity or effect can be given to any consent or agreement of a person to surrender a right or privilege secured to him by the Constitution and laws of the United States, made or implied in obedience to a statute which requires such consent or agreement as a condition to the exercise of a right or privilege granted by such statute.

Under these cases no effect can be given to Section 46 of the statute above quoted (p. 7), such as was given by the court below. If, as held by the lower court, that section implies a consent running with the land that every subsequent transferee agrees to be bound by *all* the provisions of the Act, notwithstanding certain of those provisions impair rights secured by the federal Constitution, appellants are not thereby precluded, under the decisions of this court, from questioning the validity of those provisions which violate the federal Constitution.

In the *removal cases,* some of which are above cited, this court held that, while a state may prohibit a foreign corporation from transacting any local business within the state and may impose such conditions as it sees fit in granting such privilege, yet, it may not, as a condition precedent to obtaining a permit to do a local business, require the corporation to surrender a right or privilege secured to it by the Constitution and laws of the United States. And in those cases it was held that no validity or effect could be given to the statute nor *"to any agreement or action of the corporation in obedience to its provisions."*

In the *tax cases, supra,* this Court applied the same principle to a statute of Kansas, which required a corporation of another state, as a condition of doing a local business in Kansas, to pay to the state certain graduated percentages of its capital stock. It was held that this requirement operated as a burden on the interstate business of the company, in violation of the commerce clause of the Constitution, as well as a tax on its property beyond the limits of the state, in violation of the due process clause; that, thus, it was violative of the constitutional rights of the company, and that the right of the company to continue to do business in Kansas was not and could not be affected by this condition.

The same rule was applied in Hanover Ins. Co. v. Harding, *supra*, in which this court held that a state may impose, as a condition precedent to a renewal of a license of a foreign insurance company to do business in Illinois, that all valid laws of the state shall have been complied with, but that the state may not make past compliance with a tax which is violative of the federal Constitution a condition precedent to the renewal of such license.

This principle was applied in Frost & Frost Trucking Co. v. R. R. Com., *supra*, to a statute of California which required *private* carriers using the state highways to procure a certificate of public convenience and necessity and to assume the duties and burdens of a *common* carrier. This court held the statute invalid on the ground that, even assuming that the use of its highways by private carriers for hire is a privilege which the state may deny, it cannot constitutionally exact as the price for the exercise of that privilege the unconstitutional condition that a private carrier shall assume against his will the burdens and duties of a common carrier. This court answered the contention urged in that case that the act of the carrier was a voluntary one and that he was not compelled against his will to assume the burdens of a common carrier, by saying (p. 593):

> "Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden. * * * It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that *it may not impose conditions which*

> ***require the relinquishment of constitutional rights.*** If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Need more be said to show the application of the foregoing principle to the instant case? These decisions fully sustain our position that appellants are not precluded from questioning the constitutional validity of the statute, as construed and applied in this case by the court below, because of the supposed "consent" involved in or implied from their act in purchasing lands registered under the Act, or because of the condition imposed by said Act (Sec. 46) that "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof," whether violative of the federal Constitution or not.

III.

The statute implies no consent that a certificate of title based upon a forged deed shall be conclusive in favor of a purchaser.

The Supreme Court of Illinois held in deciding the case below, that, by the terms of the statute (Sec. 46) a transferee of a registered title consents that any certificate of title issued by the registrar, even though based upon a forged deed, is conclusive against the former owner and in favor of a subsequent purchaser. We have contended above that such consent if given is invalid and not binding upon these appellants.

We wish here briefly to urge that under the provisions of the Torrens Act, a transferee of a registered title does

not consent that a certificate of title based upon a forged deed shall be conclusive in favor of a purchaser, and further that the construction of the statute to the contrary by the Illinois Court is not binding upon this Court.

Where a question is raised whether a state has violated the constitutional provision prohibiting the impairment of the obligation of contracts, this court will determine for itself the existence, construction and validity of the alleged contract, even if this involves the construction of statutes. (N. Y. Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 186; Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8.) If this power did not exist in this court, then such unconstitutional provision could always be evaded by the state courts giving such construction to a contract or such decisions in respect to its validity as to render the powers of this court of no avail. (Delmas v. Insurance Co., 81 U. S. 661, 668; Bridge Proprietors v. Hoboken Co., 68 U. S. 116, 145.)

So here, where the alleged consent of appellants to an unconstitutional provision of the statute is the basis of the Illinois decision, we submit that it is competent for this court, following the rule laid down in the cases involving the impairment of the obligation of contracts (as was done in the road assessment case of Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8) to ascertain for itself whether under the provisions of the statute any such consent was in fact given in behalf of these appellants as transferees of the title.

In reaching its conclusions as to a transferee's consent, the Illinois court failed to notice the exception contained in Section 42 in respect to the conclusiveness of the certificate and failed to give any effect to Section 47 and 54 of the act.

Sections 47 and 54 (*ante*, pp. 7-8) prescribe the conditions under which the registrar is empowered to register transfers and to issue new certificates of title. These sections in terms make the *genuine* deed of the registered owner the only authority to the registrar to register any transfer. The registrar is a non-judicial officer vested with limited powers. They are those and only those granted by the statute. Unless a *genuine* deed of the registered owner is presented to him, the registrar is without power to act and any attempted action taken by him without such authority is contrary to the statute and a nullity. His unauthorized act, like a judgment of a court entered without jurisdiction, is wholly void. By executing a deed and presenting it to the registrar, the owner thereby enters his appearance in the matter of the transfer of title, has notice of the entire proceeding and an opportunity to protect his rights. When the registrar acts upon a forged deed, the owner has no notice (no provision for notice is contained in the act) and no opportunity to be heard. His title is taken from him without due process.

By Section 46 (*ante*, p. 7) a transferee impliedly consents that his land "shall be subject to the terms of the act,"—that is, subject to *all* valid terms of the act construed together.

By Section 42 (*ante*, p. 7) a certificate of title is made conclusive in favor of a purchaser "except in case of fraud and except as herein otherwise provided." It is "otherwise provided" in the act (Sections 47 and 54) that the registrar may only make a valid transfer of title and issue a new certificate to the transferee when a *genuine* deed of the owner is presented to the registrar. It is to a transfer of title based upon a *genuine* deed and to a certificate of title evidencing *such* transfer that the owner by Section 46 consents and he does not consent that he may be deprived of his property by the autocratic action of the registrar based

upon a *forged* deed, without notice to the owner and without an opportunity to be heard.

It is a high ideal to establish a system of evidencing land titles which *at the time of acquiring title* shall protect a purchaser in expending his money. But it is a much higher ideal that such system shall protect an owner in the enjoyment of his property, *after it has been acquired.* It was to attain *this* ideal that the Fourteenth Amendment was added to the Constitution of the United States. If a person is to be deprived of his property without notice and without process by the operation of a statute on the ground that he has thereby consented to waive this constitutional protection, the provisions of the statute expressing such consent should be clear and easily understood. Such an abhorrent result should not be reached by reading such consent into a statute of doubtful meaning.

We therefore submit that appellants did not by the terms of the act agree that a certificate of title issued by the registrar based upon a forged deed should be conclusive in favor of the Wilborns and destroy the title of appellants. We further submit that it is competent for this court to determine for itself whether such consent was in fact given.

It is respectfully submitted that the federal question involved is a substantial one and that this court has jurisdiction of this appeal.

Respectfully submitted,

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel.

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OCT 12 1929

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY TO MOTION TO DISMISS APPEAL AND TO SUGGESTIONS OF REGISTRAR AS TO JURISDICTION.

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel.

BARNARD & MILLER PRINT, CHICAGO

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REPLY TO MOTION TO DISMISS APPEAL AND TO SUGGESTIONS OF REGISTRAR AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

The Registrar of Titles of Cook County, Illinois, averring that he never has been brought into court in this cause, has served appellants with a notice and copies of what is denominated a motion, the object of which is to obtain the dismissal of the appeal. He has accompanied his motion with "Suggestions" upon the question of jurisdiction, presumably in answer to appellants' "Statement as to Jurisdiction on Appeal" heretofore filed herein. Under the caption "Suggestions in Support of Motion," he has incorporated a lengthy letter to himself from the attorneys for

appellees. He has also injected unsupported statements as to the amount and quantity of lands in Cook County, Illinois (which is the only county in the State which has adopted said Act) which he asserts has been registered under the Torrens system. Without discussing the propriety of importing such matters into the record, we pass to our reply to those points involving the question of jurisdiction.

It is to be noted that the Registrar makes no attempt to sustain the constitutionality of the provisions of the Torrens Act here involved or to demonstrate that they do not infringe upon guaranties under the Fourteenth Amendment to the Federal Constitution, but confines himself to an attempt to show that appellants are not in position to raise the question on the ground that they must be held to have waived the right to do so by reason of the provisions of Section 46 of that Statute which, he claims, is binding upon them as a covenant running with the land to which they voluntarily subjected themselves.

I.

If the operation of the statute infringes upon guaranties under the Fourteenth Amendment, it may not be validated by claims of waiver or consent by reason of registration of the title to lands under the Act or the acquisition of lands already registered.

Hanover Ins. Co. v. Harding, 272 U. S. 494, 507.
Frost Co. v. R. R. Comm., 271 U. S. 583, 592-9.
Terral v. Burke Const. Co., 257 U. S. 529, 532.
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Pullman Co. v. Kansas, 216 U. S. 56, 63.
Barrow S. S. Co. v. Kane, 170 U. S. 100, 110-11.
So. Pac. Co. v. Denton, 146 U. S. 202, 207.
Barron v. Burnside, 121 U. S. 186, 200.
Doyle v. Cont. Ins. Co., 94 U. S. 535.
Ins. Co. v. Morse, 87 U. S. 445, 451.

In the above cases, this Court effectually disposed of the contention that a person or corporation which had proceeded to act under and avail itself of the benefits granted by a statute, even where he or it has expressly waived specific rights by an instrument in writing, is barred or estopped from questioning the constitutionality of such Acts, which impose or require the waiver of rights or privileges guaranteed or secured to it under the Constitution or laws of the United States, as a price or condition for the exercise of a right or privilege granted by such a statute.

As this Court said in Frost Co. v. R. R. Comm., 271 U. S. 583, at page 594:

> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The Registrar has not refuted the principle above stated. He has, however, advanced an argument and cited authorities upon the general proposition that a person may, in *a specific instance*, relinquish or waive certain constitutional rights—a proposition which may be conceded, but one which is wholly inapplicable here.

For instance, a corporation may voluntarily agree, as to a certain, specific case, not to remove it to a Federal Court, or it may voluntarily agree to pay to the State a certain,

specific invalid and unconstitutional tax; but as held by this Court in the above cases, no such agreement or consent can be compelled or imposed by a State statute or implied merely from the acts of such corporation, proceeding under or in obedience thereto, nor can such corporation be held to have consented not to remove a case to a federal court or to pay an unconstitutional tax simply because it has proceeded under or availed itself of the privileges granted by such a Statute.

As this Court said in the case of Insurance Co. v. Morse, 87 U. S. 445, at page 451:

> "A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case,* be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. *He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.*" (Italics ours.)

We think it apparent that the Registrar has failed to distinguish the principle laid down in these cases (which is the principle involved here) from the rule applied in the decisions cited and quoted by him.

II.

Assuming that any validity or effect can be given in this case to any supposed consent or waiver of constitutional rights, no consent or waiver can be implied in respect to the unauthorized action of the Registrar.

If it may be said that under Section 46 of the Statute, one registering title under the Torrens Act, or purchasing land already registered, thereby consents to be bound by the terms of the Act, whether violative of the Federal Constitution or not, such consent, we submit, applies not merely to one but to *all* of those terms. An owner cannot be said to consent to *unauthorized* acts of the Registrar. In the case of transfer of title, the owner consents that upon the presentation of *his own deed* to the Registrar, accompanied by *his* duplicate certificate of title, in accordance with the provisions of Sections 47 and 54, the Registrar may register the transfer and issue a new certificate, and that when *so* registered, such registration and such certificate shall have the force and effect prescribed by Sections 40 and 42 of the Act. He does not, however, consent that any registration of transfer or issuance of a certificate affecting his title which the Registrar may make without authority of the statute, based upon a *forged* deed or upon a blank piece of paper and in *contravention* of Sections 47 and 54, shall have the effect prescribed by Sections 40 and 42. *It is only such records and such transfers as are made pursuant to and under the authority of Sections* 47 *and* 54 *that are entitled to effect as evidence of title prescribed by Sections* 40 *and* 42, and it is to such *lawful* records and certificates, and *only* as to them, that he can be said to have consented.

III.

The sole question presented upon this appeal is the constitutionality of the Statute.

The Registrar asserts that whatever loss the appellants have suffered is attributable to their own negligence in permitting Napletone to obtain possession of their certificate of title.

At pages 12 to 14 of appellants' "Statement as to Jurisdiction on Appeal," we have already shown that, under this Statute, it was not within appellants' power to prevent the fraud perpetrated upon them and the loss of their title by retaining possession of their certificate of title.

We also showed that the Court below did not base its decision, independent of the Statute, upon any equitable ground or principle of general or local law that appellants should lose their title because of any negligence or other act on their part in suffering their certificate to get out of their possession.

As heretofore stated, the opinion contains no intimation that, independent of the provisions of Sections 40 and 42 (which sections as construed make the certificate issued to Napletone conclusive evidence of title in favor of appellees), the court would have decided adversely to appellants because they suffered Napletone to obtain possession of the duplicate certificate. To the contrary the opinion expressly states (Rec. 22) that the Wilborns "took a good title *unless the statute is unconstitutional.*" Therefore, the only ground on which rests the decision below is the constitutional validity of the statute as construed and applied in this case.

At page 10 of the Registrar's motion and suggestions, he quotes at length from the case of In re Bickel, 301 Ill. 484, 134 N. E. 76. No doubt inadvertently, he ends his quotation immediately preceding the sentence (same page) in which the Court, summing up, states *its* conclusion on this point, saying:

> "These general statements are the *ideal* which it was *hoped* the system would reach, but the practical question presented is how near the ideal may be approached in view of other established rules of property. *The certificate of title is not always entirely conclusive.* (*In re* Peters, 119 Minn. 96, 137 N. W. 390; Annotation, the Torrens Law, L. R. A. (1916D) 14 *et seq.*)" (Italics ours.)

In conclusion, we think it quite plain that to hold a certificate valid even though based upon a forged deed is coming very close to striking a death blow to the system. It is very clear that to the owner or purchaser of land it seems much more important that he may not lose it by a forged conveyance than that the evidence of title offered him as a prospective purchaser shall be conclusive. He can satisfy himself as to the latter matter for himself; but he can have no protection against the theft of his title if a forger can convey it to himself and then to a purchaser ignorant of the felony. If such a construction is ever given to the Torrens Act, it is safe to say that no one knowing of it will risk placing his title in such a precarious condition.

We again respectfully submit that the federal question here involved is a substantial one and that this Court has jurisdiction of this appeal.

Respectfully submitted,

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel.

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APR 26 193

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

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REPLY BRIEF FOR APPELLANTS.

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HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IN THE

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OCTOBER TERM, A. D. 1929.

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Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY BRIEF FOR APPELLANTS.

MAY IT PLEASE THE COURT:

The question involved in this case is not the constitutionality of the Illinois Torrens Act in its general scope. That question was long ago decided by the Supreme Court of Illinois in the case of People v. Simon, 176 Ill. 165. As there pointed out, the original registration is made pursuant to a decree of a court having general equity jurisdiction in a proceeding to which all persons having any interest in the property are required to be made parties. Subsequent registrations, when made by the Registrar, *in accordance with*

the Act, in the main, are made pursuant to authorization of the owner, or in conformity with or after the entry of orders or decrees in judicial proceedings wherein all the requirements of due process are complied with.

The constitutional questions presented by this appeal are:

First: The power of a State Legislature, consistently with the due process clause of the Fourteenth Amendment of the Federal Constitution, to provide that a purchaser of registered land (if a purchaser for value without notice, and if there has been one intervening registration) obtains good title as against the former registered owner, in a case where title is registered by the Registrar, *contrary to the terms of the Act*, and in disregard of the safeguards which the Act erects to protect the owner in his title, and where the registration is effected without notice to the owner, who thus loses his title, not because of any act or omission of his own, but simply because the Registrar ignorantly, mistakenly or fraudulently, and in disregard of those provisions of the law intended for the protection of the owner, registered title in the purchaser. Such, in effect, are the provisions of Sections 40 and 42 of the Act in question, as construed and applied in this case by the court below.

Second: Whether Section 46 of the Act in question can be construed to be a consent on the part of one acquiring registered land to the above construction and operation of Sections 40 and 42 of the Act, and be given effect as so construed, consistently with the Federal Constitution, thereby precluding him from questioning the constitutionality of Sections 40 and 42 under the due process clause of the Fourteenth Amendment.

In a great majority of cases a certificate of title issued by the Registrar under the Act may have the conclusive effect prescribed by Sections 40 and 42 without violating any pro-

vision of the Federal Constitution, but we do submit that those sections, as construed by the court below and applied to the case of the appellants, are unconstitutional.

A decision in favor of appellants upon these constitutional questions will not result in the Torrens Act being declared unconstitutional as a whole, nor will it seriously affect either the efficacy of the Torrens system of land registration in Illinois or the merchantability of titles registered under the Act.

Such a decision will merely introduce an additional exception to those mentioned in the statute to the conclusiveness of the certificate. But the Supreme Court of Illinois has already said that the conclusive effect which the Torrens Act intended should be given the certificate is an "ideal which it was hoped the system would reach," and that the "practical question presented is how near the ideal may be approached in view of other established rules of property. The certificate of title is not always entirely conclusive. (In re Peters, 119 Minn. 96, 137 N. W. 390; Annotation, the Torrens Law, L. R. A. (1916D) 14 *et seq.*)" (In re Bickel, 301 Ill. 484, 492.)

Indeed, in the case which established the constitutionality of the Torrens Act in Illinois in its general scope (People v. Simon, 176 Ill. 165), an exception not found in the statute to the conclusive effect of the certificate was suggested by the court. The court there held (p. 177) that Section 26, which apparently attempted to make the decree of initial registration binding upon persons not parties to the suit, if an appearance and answer were not filed within two years after the entry of the decree, if given effect literally, would deprive persons of due process of law, and that the provision could not be sustained as a limitation law against one in possession of the property at the time of the commencement of the suit. The court then held that to the extent that the Act attempted to transfer property without due process of law, it could not be upheld.

Necessarily, under that decision, the certificate is not conclusive upon a person not a party to the suit who was in possession of the land at the time of the initial registration.

The question of the effect of a decree of initial registration and certificates of title issued thereunder as against one who had a title of record and was in possession at the time of the commencement of the registration proceeding, and who was not a party thereto, was determined by the Supreme Court of Illinois in an opinion delivered on April 17, 1930, in the case of Sheaff v. Duplissis, *et al.* The court there held that a decree directing registration was void as against a person required by the statute to be made a party, who, in fact, was not made a party. While in that case the person who was not made a party was in possession, the opinion of the court is that under the Illinois statute, properly construed, a decree in such a proceeding is void as against persons not parties who were required by the Statute to be made parties, the court holding that it was not intended "to attempt a modification of the rule which required notice before judgment by a court."

While the court therefore found it unnecessary in that case to decide constitutional questions argued on the subject of due process of law, the court remarked:

> "It is an elementary principle of law, for which the citation of authority is superfluous, that no adjudication of a court which may deprive a person of his liberty or property is of any validity against him unless it has been rendered with due process of law, which requires notice and an opportunity to be heard."

We submit that if an adjudication of a court made without notice and an opportunity to be heard is void, so also is a determination, having the same practical effect, made by an administrative officer without notice. Under that decision, there is introduced an exception not found in the Statute to the conclusiveness of a Torrens Certificate. And we further

submit that it will also be necessary to introduce exceptions to the conclusiveness of such certificates in all cases where required in order to give due effect to the Federal Constitutional provision prohibiting a State from depriving a person of his property without due process of law.

This was done in California when it was held that a certificate of title was not conclusive in favor of a purchaser who relied thereon, as against the holder of an unregistered easement who, being in possession, was not made a party to the initial registration proceeding.

Follette v. Pac. L. & P. Corp., 189 Calif. 193, 214-5.

As the time within which application may be made for a rehearing in the case of Sheaff v. Duplissis has not expired, and the case, therefore, is subject to further consideration by the Supreme Court of Illinois, the opinion is not yet published. For the purpose of making the whole opinion available to the court, we intend to move this court for leave to file a certified copy thereof.

As we have already mentioned, on pp. 24 and 25 of our original brief, the Supreme Court of Illinois by its decisions has introduced additional exceptions to the conclusiveness of such certificates.

Exception from the conclusive effect of the certificate in cases of forgery is made by statute in Massachusetts, Ohio, North Carolina, Tennessee, and England. (See pp. 13 and 14 of our original brief.)

Other exceptions from the conclusive effect of certificates of title which probably will be introduced by the courts (where not already provided by statute) in order to give effect to State and Federal constitutional provisions, requiring due process of law before divesting one of his title to real estate, and because of the dual form of government in force in the United States, may be mentioned:

1. A transfer made by a Registrar from a living person to his supposed heirs or devisees upon false evidence of death or pursuant to a decree in a cause to which the living person was not made a party.
2. A transfer made by a Registrar to one of two joint tenants upon false evidence of death of the other.
3. Registration by the Registrar of title to property which was actually never brought under the Act.
4. Conflicting certificates of title covering the same property.
5. Liens of the Federal Government or of others procured or asserted under Federal laws and not appearing on the register.
6. Pending proceedings in Federal Courts affecting the title not appearing on the register.

Unlike the Illinois Torrens Act, the Torrens Acts of all the other States, except Nebraska and Oregon, contain a statutory exception of liens, claims or rights arising or existing under the laws or Constitution of the United States which the statutes of the State cannot (or in some instances do not) require to appear of record.

Notwithstanding the exceptions created by the statutes and the decisions above mentioned and those which probably exist independently of them, the Torrens System has continued to be operative in all of the States in which it was adopted.

Much consideration is given in the brief for the appellees to the power of the State to enact laws to secure title to real estate, but the sections of the Torrens statute involved in this case, as they have been construed by the Supreme Court of Illinois, instead of securing an owner in his title to real estate, jeopardize his title once he has purchased, and make it a title which, in effect, is held at the will of the Registrar and which is not entitled to the protection given to other prop-

erty by the State and Federal Constitutions. These provisions of the statute, as so construed and applied, allow one's title to be wrested from him without notice or consent and without opportunity for hearing.

The sections of the statute in question really are inserted for the purpose of facilitating transfers of title. They have not in view the protection of the title of the registered owner but the protection of one who intends to purchase his title.

The question, therefore, is really as to the power of the State to transfer property from one private owner to another without notice or hearing in order (it is claimed) to make efficient a system for the simple and rapid transfer of title to real estate. Is not that object as well secured by compelling resort to the indemnity fund by the purchaser who has relied upon a false certificate and who, if our view of the case is correct, has never acquired an interest in the land which entitles him to the protection given to property rights by the Federal Constitution, rather than by depriving the true owner of his property and compelling him to resort to the indemnity fund or action against the county?

The appellees, in several instances, refer to appellants' right under Section 101 of the Torrens Act to resort to the indemnity fund, but if we are correct in our conclusion that the appellants are not deprived of their property by a registration based upon a forged deed, there is no right on the part of appellants to resort to the fund, because they have sustained neither loss nor damage, nor have they been deprived of any right or interest in their land or precluded from bringing an action for the recovery thereof.

ARGUMENT.

I.

THE QUESTION OF JURISDICTION.

A.

Appellants seasonably invoked the protection of the Fourteenth Amendment to the Federal Constitution. The questions arising thereunder, in fact, were considered and decided by the Supreme Court of Illinois.

1. *Appellants seasonably invoked the protection of the Fourteenth Amendment.*

Appellants, in their original brief in the court below (p. 24 thereof) contended that if Sections 40 and 42 of the Torrens Act should be construed as they were afterwards construed by the court below they were unconstitutional and prohibited by Section 2 of Article II. of the Illinois Constitution and by the Fifth Amendment to the United States Constitution.

The reference to the Fifth Amendment, instead of the Fourteenth, was inadvertent. In the reply brief filed by appellants in the court below (p. 9), the pertinent provision of Section 1 of the Fourteenth Amendment was quoted, and reliance was placed thereon. After the first opinion of the court, appellants filed their petition for rehearing, on page 7 of which they again referred to the Fourteenth Amendment and invoked its protection as against Sections 40 and 42 of the Act as construed in the opinion which had been filed. (Certified copies of appellants' reply brief and petition for rehearing were filed in this Court as appendices to the Ap-

pellants' Statement as to Jurisdiction on Appeal.) This petition for rehearing was granted and the case reconsidered, but the same opinion was later refiled as the opinion of the court, one justice thereof dissenting. (R. 16, 17.)

The Supreme Court of Illinois has held that the granting of a rehearing in a case pending before it has the same effect as the granting of a new trial in the trial court, and that it operates to vacate the judgment, and the whole case is subject to review and is open for argument upon *any question* in the case.

Becker v. Billings, 304 Ill. 190, 205.

Colesar v. Star Coal Co., 255 Ill. 532, 543.

Public Utilities Com. v. P. C. C. & St. L. R. R. Co., 290 Ill. 580, 584.

The underlying reason for those decisions undoubtedly is that under the rules of the State Court, when a petition for rehearing is granted, opportunity is given to answer the petition for rehearing, so that all parties have an opportunity to be heard upon the questions presented by the petition for rehearing.

There is thus left no ground for the alleged inference claimed by counsel that the court below refused to consider the Fourteenth Amendment for the reason that it was mentioned for the first time in the reply brief or in the petition for rehearing.

The authorities cited under Points (1) and (2) on page 24 of the appellees' brief, therefore, are not in point where a rehearing has been granted. Under the authorities and practice of the Supreme Court of Illinois, and its decisions, the constitutional questions in this case under the Fourteenth Amendment were timely presented before that court.

2. *The constitutional questions under the Fourteenth Amendment, in fact, were considered and decided by the Supreme Court of Illinois, and therefore this court has jurisdiction to review the judgment of that court on those questions.*

Where the State Court, by its opinion, considers and decides a Federal question, this Court will regard the question as duly presented.

Miedreich v. Lauenstein, 232 U. S. 236, 243.
Hill v. Smith, 260 U. S. 592, 594.
North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 257.

Reference may be made to the opinion of the Supreme Court of the State for the purpose of determining the Federal questions presented to and decided by that court.

Gross v. United States Mortgage Co., 108 U. S. 477, 486.

Applying the rules announced in the foregoing cases to the opinion of the court below in this case, we submit it appears that that court considered and decided the application to the case of that clause of the Federal Constitution which prohibits a State from depriving any person of his property without due process of law, and that the reference in the opinion to the Fifth Amendment was merely inadvertent.

It is said in the opinion (Rec. 22):

> "Appellants insist that if this construction is placed upon the statute it is unconstitutional, for the reason that it is in violation of section 2 of article 2 of the State constitution and the fifth amendment to the Federal constitution, which provide that no person shall be deprived of life, liberty or property without due process of law. The principal grounds for claiming that the *statute* is unconstitutional are, *that there is no provision in it for*

notice to appellants so they could have the opportunity to appear and defend their title, and that because no opportunity was given them to defend they were deprived of their property without due process of law." (Italics ours.)

After considering the questions at some length, the court says (R. 25):

"The statute is not unconstitutional because it deprived appellants of the title to their property without due process of law."

While reference is made to the Fifth Amendment, it will be noted that the court states the ground of unconstitutionality relied upon by appellants to be that the *statute* contains no provision for notice to appellants so that they could have the opportunity to appear and defend their title, and therefore "they were deprived of their property without due process of law." (R. 22.) From the foregoing quotation, it appears the State Court considered that appellants were relying on that provision of the Federal Constitution which operates to prohibit a State from depriving a person of his property without due process of law, and it was that contention of appellants, as well as the contention that such legislation was contrary to the State Constitution, that was decided adversely to appellants when the court said: "The statute is not unconstitutional because it deprived appellants of their property without due process of law." (R. 25.)

If reference is made to the briefs and petition for rehearing in the State Court on file herein, the inadvertent error of the court in referring to the Fifth instead of the Fourteenth Amendment is readily explainable. But we submit that, regardless of the clarification of the opinion which results from a perusal of the briefs and petition for rehearing, it appears sufficiently from the opinion itself that the State Court considered the application to the case of that provision of the Federal Constitution, whatever it is, which oper-

ates to prohibit a State Legislature passing a law depriving a person of property without due process of law.

This Court has held that, in ascertaining what the State Court has decided, consideration should be given to all of the language of the opinion of that court, and to the real substance and effect of that court's decision.

McCullough v. Virginia, 172 U. S. 102, 116-7.

If that is done in the instant case, then we submit, under the authorities first cited under this heading, this Court has jurisdiction to review the judgment of the court below in this case.

B.

The State Court's judgment is not based upon an independent non-Federal question.

It is contended by appellees that the State Court's judgment is based on grounds which do not involve the decision of a Federal question, and so this Court has no jurisdiction to review that judgment. The first argument advanced in support of this contention is that appellants, by purchasing registered property are estopped to question the constitutionality of the Act, and that the State Court so decided, and, such a decision is upon an independent non-Federal question. (Appellees' Brief, p. 26 *et seq.*)

This point is answered in our original brief. (Point F, p. 57 *et seq.*)

To the authorities there cited, we add the case of Union Pacific R. R. Co. v. Public Service Commission, 248 U. S. 67, 69, where it is held that under the later decisions, "it is the duty of this court to examine for itself whether there is any basis in the admitted facts or in the evidence, when the facts are in dispute, for a finding that the Federal right has been waived."

It is also contended (Appellees' Brief, p. 26) that the State Court's decision was placed upon an independent non-Federal ground, because the opinion states that "Appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute." (R. 25.)

Two sufficient answers may be made to this contention: *First,* that the quoted sentence is not a *decision* by the State Supreme Court of an independent non-Federal question; and, *Second,* if it were, it is so plainly untenable that it will be disregarded by this Court.

We submit that a reading of the State Court's opinion discloses that its decision was based upon the proposition that the agreement implied under Section 46 was binding upon appellants and operated as a consent by them to Sections 40 and 42 of the Act, and, because of such consent, the statute did not unconstitutionally deprive appellants of their property without due process of law, and that the State Court did not decide upon the equities, if any, arising from the fact that appellants entrusted their certificate of title to Napletone.

There was no consideration given by the State Court to the rule suggested by counsel for appellees on page 33 of their brief, that where one of two innocent persons must suffer by the fraud of a third person, he who puts it in the power of the third person to perpetrate the fraud must bear the loss, or to the equities of the case between the appellants and the appellees. The sentence of the opinion of the State Court quoted by appellees as a decision upon a non-Federal question was merely "a make-weight, which adds nothing to the substantial basis" for the decision. (Hartford Life Ins. Co. v. Barber, 245 U. S. 146, 150.)

This appears from the statement in the opinion that the Wilborns "took a good title *unless* the statute is unconstitutional." (R. 22.) Conversely, if the statute was unconstitutional, appellants retain their title to the property.

What the court undoubtedly had in mind, when it made the remarks relied upon by counsel for the appellees, was not a protection which the statute affords, but a so-called protection based on the mere assumption that the probabilities are that without the duplicate certificate the Registrar would not have made the transfer; but it is apparent that the same arguments apply to the absence of a deed. The owner has a right to assume that not only the duplicate certificate of title, but also his deed, will be required before a transfer is effected. The conclusiveness of the certificate of the Registrar destroys all the safeguards prescribed in the Act.

The rule that where the decision of a State Court may rest upon a non-Federal ground, this Court will not take jurisdiction to determine the Federal question, has no application, where the non-Federal ground might have been considered by the State Court, but was not.

Grayson v. Harris, 267 U. S., 352, 358.

Rogers v. Hennepin County, 240 U. S., 184, 188.

In St. L., I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, where there were some expressions in the opinion of the State Court upon which one might conjecture that the State Court was deciding the case on other than the Federal question, the Court said (p. 276):

> "Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect."

In another case, where it was doubtful whether the State Court intended to place its decision upon a non-Federal ground apparently mentioned in the opinion, jurisdiction of the case was assumed by this Court.

German Savings & Loan Society v. Dormitzer, 192 U. S. 125, 127.

And if the State Court's decision had been placed on such a basis as asserted, it would be manifestly untenable. Certainly appellants were in no worse position than the owner of stock certificates or written instruments who entrusts them, unendorsed, to another, who in turn forges the owner's name thereto and transfers them to innocent purchasers for value. In such cases, it is uniformly held that title does not pass under the forged endorsement, although accompanied by delivery of the genuine certificates or instruments.

Unity Banking & Saving Co. v. Bettman, 217 U. S. 127, 135.

Penn. Co., etc. v. Franklin Fire Ins. Co., 181 Pa. 40, 48-9.

II. Cook, Corporations, Sec. 366 (8 ed.).

Atherton v. Michigan Guaranty Corp., 237 Mich. 133, 136.

Fay v. Slaughter, 194 Ill. 157, 169.

Graves v. American Exchange Bank, 17 N. Y. 205, 208.

Prudential Ins. Co. v. National Bank of Commerce, 227 N. Y. 510, 514-5.

Gustin-Bacon Co. v. First National Bank of Englewood, 306 Ill. 179, 182-3.

Grand Lodge of Kansas v. State Bank, 92 Kan. 876, 882, *et seq.*

This Court has determined that its jurisdiction is not ousted by the determination of the cause by the State Court on a plainly untenable non-Federal ground. To permit this would be to permit the State Courts to fritter away the jurisdiction given to this Court to review their judgments.

Ward v. Board of County Commissioners of Love County, 253 U. S. 17, 22.

Terre Haute and Indianapolis R. R. Co. v. Indiana, 194 U. S. 579, 589.

II.

THE QUESTION OF ESTOPPEL.

It is urged in the brief of the Registrar of Titles that Section 46 of the Act, which the court below construed as an implied agreement running with the land, that the same shall be subject to the terms of the Act and to all amendments and alterations thereto (R. 22, 23) is not a consent to waive constitutional guarantees, but on the contrary, when land is brought under the Torrens System it is an exchange of old rights and liabilities for the new rights and liabilities which are created under the system, and when constitutional provisions are invoked they are to be read with reference to the rights under the new system, and all rights acquired under the new system come with any conditions annexed thereto by the Legislature. (Registrar's Brief, pp. 66, 67, 95.)

There is no essential difference between this contention and the contention that the State can attach, as a condition to the exercise of a privilege which it may withhold at pleasure, the waiver of rights guaranteed by the Federal Constitution.

We may concede that the State may classify real estate into two classes—registered and non-registered—and may enact different rules regulating their transfer, but both classes of real estate are species of property which may be bought and sold. Every person has the privilege (in fact, the constitutional right) to acquire either species, and we submit both species are property entitled to the protection of the due process clause of the Fourteenth Amendment, and the State may not compel in the case of either species a consent by the purchaser to waive rights guaranteed by the Constitution of the United States as the price for exercising the privilege or right of acquisition. This is particularly true where no opportunity is afforded to withdraw land from the operation of the Torrens Act once it has been registered.

Expressed in other words, the contention so made by the Registrar is that the State has power to classify property, and by the exercise of its power of classification, to create one class of property which is not guarded and protected by the Federal Constitution. The answer to the Registrar's contention, we submit, will be found in those authorities which are mentioned in our original brief, Point C, pp. 34-43.

It is argued in appellees' brief (p. 28) that appellants accepted the benefits of the Torrens Act and cannot now, therefore, challenge its validity.

As we pointed out above, we do not question the constitutionality of the Torrens Act in its general scope; what we do question is the constitutionality of certain sections thereof as construed and applied by the court below. We do not contend for the invalidity of any of the provisions of the statute for initial registration, nor of those whereby the Registrar, upon presentation of a genuine deed and the duplicate certificate of title, is empowered to transfer title and issue a new certificate. We do not contend that Sections 93 and 94 of the Act, under which the petition in this case was filed, are unconstitutional.

In practically every instance where this Court has held invalid a waiver, or a consent or agreement to the surrender of rights secured by the Federal Constitution, the party asserting the invalidity of such waiver or consent had, himself, invoked or availed of the privilege granted by the Statute which imposed such waiver or consent as a condition to the exercise of such privilege. This is true in the following cases:

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 468.
Power Mfg. Co. v. Saunders, 274 U. S. 490, 496.
Frost Trucking Co. v. R. R. Commission, 271 U. S. 583, 593.
Barrow Steamship Co. v. Kane, 170 U. S. 100, 110-1.

Southern Pacific Co. v. Denton, 146 U. S. 202, 207.
Barron v. Burnside, 121 U. S. 186, 200.
Insurance Company v. Morse, 87 U. S. 445, 451.
International Paper Co. v. Massachusetts, 246 U. S. 135, 141.
Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 36.

The case of W. W. Cargill Co. v. Minnesota, *supra*, cited and approved in the recent case of Power Co. v. Saunders, *supra*, involved the constitutionality of certain provisions of the Minnesota statute licensing and regulating grain elevators and warehouses. The statute contained a provision similar to Section 46 of the Illinois Torrens Act, and provided that "every person, company or corporation receiving such license shall be held to have accepted the provisions of this Act, and thereby to have agreed to comply with the same." This Court held untenable the contention there asserted that by accepting a license under the Act the licensee would estop himself from asserting the unconstitutionality of any of the provisions of the Act, and said (p. 468): "the acceptance of a license in whatever form will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States." This language was quoted in Power Mfg. Co. v. Saunders, 274 U. S. 490, 496.

This subject is also considered in our original brief under Point C (pp. 34-43).

This case is unlike Booth Fisheries v. Industrial Commission, 271 U. S. 208, where there was a purely elective statute giving one the choice of accepting its provisions or not and allowing a withdrawal from the election at yearly intervals and not requiring, as a price of refusal to accept the provisions of the Act, the waiver of any privilege or right whatsoever.

The same is true of St. Louis Malleable Casting Co. v. Prendergast Construction Co., 260 U. S. 469, and Grand Rapids and Indiana Railway Co. v. Osborn, 193 U. S. 17.

The case of Pierce Oil Co. v. Phoenix Refg. Co., 259 U. S. 125, relied upon by counsel for appellees on the question of estoppel, is not in point, for the reason that the Pierce Company had no authority to construct pipe lines within the State and necessarily across the public highways of the State for the private use of the Pierce Company only. Its only authority was under a statute which provided that the lines when constructed should be open for public use as a common carrier. Therefore, when the company obtained authority to construct its pipe lines for the purposes and upon the conditions imposed by the statute, it voluntarily agreed to be bound thereby. Neither under the statute, nor independently of it, did the company have any right to construct pipe lines within the State for its private use only. It was authorized to construct its lines for private *and* public use, and when so constructed, could not deny the right of the State to direct that the lines be used as thus authorized.

We also here observe that the Torrens Act does not give the owner, or one intending to purchase from him, the right to withdraw the land from the operation of the Act. One intending to purchase registered land, therefore, is required, under the construction of the Act adopted by the court below, either to submit to the Act or forego the privilege of purchasing the real estate. When it is considered that the Supreme Court of Illinois in Evans v. Chicago Title and Trust Company, 317 Ill. 11, on p. 19, said (referring to The People v. Simon, 176 Ill. 165) that there was no reason why the Legislature could not have chosen to make the Torrens System compulsory upon the owners, the consequence of the opinion of the State Court in this case becomes at once apparent. The way is then left open for Illinois to prescribe a system of recording or registering titles to real estate under which it

may require, as a condition to the acquisition of any real estate within the State, the waiver of all the rights secured thereto by the Constitution of the United States.

Nor does the fact that appellants sought relief under Sections 93 and 94 of the Torrens Act, admitting the validity of the Torrens Act in its general scope and the right of the court to proceed under those sections, and asking only that certain sections of the Act be construed so as to give them the relief which they sought, or if otherwise construed that they be held to violate the provisions of the State and Federal Constitutions, estop them from asserting such constitutional questions.

Whether the court below would construe Sections 40 and 42 of the Act as giving conclusive effect to a Registrar's certificate of title where the title was transferred by the Registrar contrary to the terms of the Act, without notice or hearing, was a matter unknown to appellants and to all others who purchased registered land until the opinion of the court below in this case. Appellants' petition alleged that the title to the premises in question had passed to appellants and that a certificate registering the title in appellants was duly issued by the Registrar of Titles. (R. 1, 2.) All of this amounted to an allegation that the certificate of title of appellants had been issued in accordance with the terms of the Act by the Registrar and not contrary thereto.

It would be strange indeed if the fact that appellants filed their petition under those sections of the Act should bar them from the relief which they seek in this proceeding. The questions which they raise are as separate and distinct from the provisions of the Act under which they filed their petition as though contained in an independent Act. It would be surprising, if the chancery law of the State were codified into a single enactment or chapter of the statutes in which, among other things, the various equity bills which might be filed were classified and other provisions made relating to

equity jurisdiction and the form and conduct of proceedings in equity causes, if one could not in an equity suit brought under such statute question the constitutionality of one of the sections of the statute which in no way related to the form of proceeding which was filed by him.

It is contended under Point E of Appellees' Brief (pp. 33 and 34) that the State Court's decision in this case is based upon a non-Federal question, viz.: the principle that where one of two persons must suffer by the fraud of a third, he who put it in the power of the third person to perpetrate the fraud must bear the loss. We have pointed out under Point I of this Reply Brief that the State Court's decision was not *based* upon any such ground, and therefore, this court has jurisdiction to review the judgment. We do not understand that it is the practice of this Court in cases coming to it on appeal from the highest court of the State to decide the case upon a question of local law not made a basis of decision by the State Court.

III.

APPELLANTS WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

That appellants were deprived of their property without due process of law (apart from the consent feature introduced by Section 46 of the Act) was not very much mooted in the court below and apparently was assumed by that court. The question is considered under Point A of our original brief (p. 13), but in view of the rather extended argument of appellees on this question we make the following additional observations.

We do not question the power of the State to regulate the tenure of real property within its limits, the modes of its acquisition or transfer, or the rules of its descent or the right of testamentary disposition thereof. We do contend, how-

ever, that when one has lawfully acquired title to real estate in accordance with the law of the State he cannot be deprived of such title without his consent by any State agency without due process of law.

It is argued on page 41 of appellees' brief that neither Sections 40 nor 42, nor any other section of the Act, purports to take the property of one person and give it to another. In the court below that construction was contended for by appellants, but their construction was rejected by that court. Sections 40 and 42 of the Act, as construed and applied by the court below, operate to make conclusive a certificate of title issued by the Registrar to one who has purchased in good faith without notice, for value, from the person in whose name title is registered and thus preclude the true owner from asserting his title against such purchaser. To make the recitals of any certificate (not the result of a hearing after notice) conclusive of the rights of parties in subsequent litigation without an opportunity to the party whose rights are to be affected to show the true facts, is a violation of due process. (See authorities pp. 18 and 20 of our original brief.) The rule last mentioned has been applied in this Court to State statutes purporting to make tax deeds issued by public officers conclusive evidence of title and conclusive that all proceedings required or directed by law in relation to the levy, assessment and collection of taxes have been had and done in accordance with law.

Marx v. Hanthorn, 148 U. S. 172, 182.

Similar statutes making tax deeds issued by State officials conclusive evidence of their own validity have uniformly been held unconstitutional, as being violative of due process. See cases in Note, 30 Am. L. Reports, 16.

What was said in Lufkin v. Galveston, 73 Tex. 340, in holding such a statute invalid, is strikingly applicable to the instant case, viz. (p. 342):

> "To say that this could be done would be to hold that the owner could be deprived of his property by the arbitrary action of an officer, proceeding under the pretense of lawful authority. This would be simply to enable one man to transfer the property of another for a purpose not authorized by law, and would not be according to the due course of the law of the land."

And as said in Cairo & F. R. Co. v. Parks, 32 Ark. 131, 145:

> "If the legislature has power to do this, then that provision in the Bill of Rights which ordains that 'no one shall be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land,' is a dead letter, because to deprive the citizen of the right to protect his property by showing that it has been taken from him contrary to law is, in effect, denying to him the protection of the law."

We also refer to Schlessinger v. Wisconsin, 270 U. S. 230, 239, 240, on the general question of the power of the State, consistently with the due process clause, to provide by legislation for a *conclusive* presumption.

A.

To constitute due process, notice is required in any proceeding, administrative or judicial, where a person's property rights are to be affected, except in those few instances where notice is dispensed with by settled ancient usage.

Counsel for appellees contend (Brief pp. 37-50) that from time immemorial the laws have provided what was necessary for the transfer of title from one person to another, and that there is nothing unreasonable nor unconstitutional in making the Registrar the one whose duty it is to keep all records, to make all entries, to issue all certificates of title, and

"to *determine* whether the transferor can legally convey the lands, to *determine* whether the proposed transfer conforms with the law."

In this connection, counsel state that the statute makes provision for a hearing before the Registrar whenever any transfer is to be made, and that under Section 5 he is authorized to appoint lawyers as examiners of title, and that by Sections 93-94 his actions are subject to proceedings for correction by the Circuit Court.

We make no point that the Registrar can not be authorized by statute to conduct a hearing in the ordinary case of a voluntary transfer by deed from the owner, but even if it be held that Sections 47 and 54 of the Act in effect provide for a hearing, nevertheless, no *notice* of such hearing is required by the statute to be given to the owner and no notice in fact was given in the instant case to these appellants. And we assert that, in the absence of a genuine deed executed by the owner, a hearing without notice and without any provision for notice, so that one whose rights are to be affected has no opportunity to be heard, is wholly ineffectual as constituting due process of law. If the owner has executed and delivered a deed, no further notice is required, because the deed is authority from the owner to the Registrar to make the transfer; but where the transfer is made without the owner's deed and without notice to him, no *ex parte* hearing before the Registrar can constitute due process of law.

The question of what constitutes due process of law was exhaustively considered by this Court in Twining v. New Jersey, 211 U. S. 78, 110-112. This Court there declined to give a comprehensive definition of the phrase "due process of law," but stated it preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions of cases as they arise. The Court, however, said that there were certain general principles, well settled, which narrowed the field of discussion and

might serve as helps to correct conclusions. These principles grew out of the proposition universally accepted by American courts that the words "due process of law" are equivalent in meaning to the words "law of the land."

From a consideration of the meaning of the words, in the light of their historical origin, the Court there drew the following conclusions. (pp. 100-102)

> "First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. * * * 'A process of law,' said Mr. Justice Matthews, commenting on this statement of Mr. Justice Curtis, 'which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country.' * * *
>
> "Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. * * *
>
> "Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words 'due process of law' 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private

rights and distributive justice.' * * * 'This court has never attempted to define with precision the words 'due process of law' * * * It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' "

The Court then proceeded to consider some of those principles which are fundamental principles of liberty and justice, inherent in the very idea of free government and the inalienable right of a citizen of such a government, which are protected by the due process clause and which cannot be disregarded by any State. (See pp. 102 *et seq.*)

The Court then considered the question of the essential elements of due process of law and said (p. 110):

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction * * * *and that there shall be notice and an opportunity for hearing given the parties.*" (Italics ours.)

In Garfield v. Goldsby, 211 U. S. 249-262, this Court held that there is no place in our constitutional system for the exercise of arbitrary power by a public official.

At page 262 of the opinion, the Court said:

"In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an *administrative or judicial proceeding* cannot be deprived of them *without notice* and an opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded *is of the essence of due process of law.*" (Italics ours.)

This was said in one of the Indian allotment cases where, after the Secretary of the Interior had approved a list containing the name of a person found by the Dawes Commission to be entitled to enrollment for distribution, that officer,

without giving the person notice and an opportunity to be heard, struck his name from the list.

The principle announced in Twining v. New Jersey, and reiterated in Garfield v. Goldsby, that notice and an opportunity for a hearing are essential to due process of law, whether in an administrative or judicial proceeding, has been adhered to in many cases decided by this Court.

Jacob v. Roberts, 223 U. S. 261, 265.
Simon v. Craft, 182 U. S. 427, 436.
Baker v. Baker, Eccles & Co., 242 U. S. 394, 403.
Coe v. Armour Fertilizer Works, 237 U. S. 413, 425.
Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123.

In tax cases and in special assessment proceedings it has been uniformly held that notice or an opportunity to review is necessary and "must be provided as an essential part of the statutory provision."

Central etc. Railway Co. v. Wright, 207 U. S. 127, 138.
Londoner v. Denver, 210 U. S. 373, 385.
Turner v. Wade, 254 U. S. 64, 68, 70.
St. Louis Land Co. v. Kansas City, 241 U. S. 419, 430.

We again note for the Court's consideration the quotation on p. 4 of this reply brief from the opinion of the Supreme Court of Illinois in Sheaff v. Duplissis, *et al.*, regarding the necessity of notice and an opportunity to be heard as a requirement of due process in a proceeding under the Torrens Act.

But counsel argue that the action of the Registrar is "subject to proceedings for correction by the Circuit Court" under Sections 93 and 94, and, therefore, the owner is given

an opportunity to correct the action of the Registrar and that this constitutes due process. If the owner were, in fact, given such an opportunity and were permitted to avail of it, this would no doubt constitute due process, though he had no prior notice of the proceeding leading up to the transfer; but such is not the statute as construed and applied by the decision of the court below in this case. That is exactly what appellants attempted to do. They sought in this proceeding to have set aside and corrected the unauthorized action of the Registrar in making the transfer, but were met at the threshold by the contention, which the court below sustained, that the certificate of title was made conclusive and therefore they were not entitled to obtain such relief in this or in any other proceeding.

The provision for review of the Registrar's action is a mere gesture if, under this statute, the conclusiveness of the certificate bars any inquiry upon such an application.

B.

Protection, consistent with the due process clause of the Constitution, is not afforded to an owner by the retention of his duplicate certificate of title.

Appellees make the further contention that an owner is given ample means of protection and can always obtain a hearing before the Registrar by holding on to his certificate of title. As we pointed out on pp. 21-23 of our original brief, the retention by the owner of his duplicate certificate of title is no more a legal protection against an unauthorized transfer than is his failure to execute a deed. It appears from the construction which was given to Sections 40 and 42 that there was no means by which appellants could have safeguarded their interests so as to protect them against an unauthorized transfer by the Registrar. It is idle to say that appellants could have safeguarded their property by retaining posses-

sion of the duplicate certificate of title when the court held, as it did, that purchasers for value, in good faith, are not required to inquire into the title prior to the date of the certificate of title of the registrant from whom they purchase. (R. 22.)

At page 49 of appellees' brief, counsel say:

> "The act in the case at bar certainly is analogous. It says to the owner, '*Hold on to your duplicate certificate of title; no transfer of title can be made without its surrender.* * * *'
>
> "And to the owner who alleges that he was not before the registrar of titles when his land was registered in another, there is the reply, 'But it was your duty to be there.' To insure his being called before the registrar all that he need do is to safely keep his duplicate certificate of title. *It is his duty to keep it.*"

This, we submit, is a most palpable fallacy. It is utterly untrue that, under the Act as construed in this case, "no transfer of title can be made without its surrender", or that the owner's retention of his certificate "insures his being called before the registrar." The statute, as construed, does not so provide. The statute says to the owner (Secs. 46, 54): "Hold on to your deed and also your certificate, for without these being presented to the Registrar he shall have no *authority* to make a transfer." But the statute as construed also says (Secs. 40, 42) that if the Registrar *does* make a transfer without such authority, his certificate shall nevertheless be conclusive in favor of a *bona fide* purchaser, notwithstanding neither the owner's deed nor his certificate was produced as required by Sections 46 and 54. How idle, therefore, it is to assert that the owner cannot be deprived of his property under this Act if he holds on to his certificate. It may be asserted with equal force that he cannot lose his property if he holds on to his deed.

It is as easy to forge a certificate as it was in this case to forge a deed. An owner's duplicate certificate might be

securely locked away in his safety-deposit vault—and still, under the decision by the State Court that a subsequent certificate is conclusive against him, his land might be stolen from him by the simple trick of forging a duplicate certificate or affidavit of loss, presenting it with a forged deed, obtaining a new certificate from the Registrar and then conveying to a purchaser without notice, or by inducing the Registrar to make the transfer without any certificate, forged or otherwise. In other words, the conclusiveness of the certificate of the Registrar destroys all the safeguards otherwise prescribed in the Act.

Under Sections 47 and 54 of the Act, the Registrar has no more authority to register a transfer upon the presentation of a forged deed, accompanied by a duplicate certificate, than he has to make a transfer upon the presentation of a genuine deed without the surrender of the duplicate certificate of title or the affidavit of loss required by Section 58. If, in the absence of a deed, the Registrar's certificate is made conclusive by the statute, then the statute fails to give an owner the protection which the Constitution guarantees. The owner has as much right to assume that the transfer will not be made without his deed as he has to assume that it will not be made without his certificate.

To constitute due process of law the *statute* itself must afford protection and not the *probable* action or non-action of the Registrar. Due process is not afforded by the mere probability that the retention of the certificate or the failure to execute a deed will prevent an unauthorized transfer by the Registrar.

The principle is somewhat analogous to the cases cited by this Court in Coe v. Armour Fertilizer Works, 237 U. S. 413, 424-5, where in respect to a statute which did not provide for a notice in any form, but where the party in fact received notice, it was held that it was not sufficient that the party have notice, but to constitute due process of law, the statute itself must provide for notice.

A similar ruling was made by this court in the late case of Wuchter v. Pizzutti, 276 U. S. 13, 19, 24.

It is urged by appellees that the owner is required to attend before the Registrar if he desires to be heard in the matter of the transfer; but, as pointed out above, due process requires in a matter such as this that the owner be given notice to attend and an opportunity to be heard. Until the owner has executed the deed, there is no occasion for him to attend the Registrar in the matter of a transfer, which, by the very terms of the statute, the Registrar cannot lawfully make. A person is never required to attend a court until the court has acquired jurisdiction over his person. An owner is certainly not required to anticipate that the Registrar is going to make a transfer except as authorized by the terms of the Act.

C.

Notice, as a requisite of due process, may be dispensed with only when not required by settled ancient usage, which prior to the adoption of the Constitution and its amendments constituted the "law of the land."

None of the cases cited by counsel, except two which are distinguishable on other grounds and will be hereafter mentioned, support the proposition that a hearing under the Torrens Act conducted by the Registrar without notice, is due process of law. In all of the cases cited in appellees' brief, except the two above mentioned, the law provided for a hearing before a properly constituted body and an opportunity to be heard.

The two cases cited in appellees brief on due process where there was no notice given are the cases of Den v. Hoboken Land & Improvement Co., 18 How. 272, 280, and Miedreich v. Lauenstein, 232 U. S. 236, 247.

Both of these cases, come within the first class of cases mentioned in Mr. Justice Moody's opinion in Twining v. State of New Jersey, 211 U. S. 78, page 100, *i. e.*, proceedings sanctioned by settled ancient usage and therefore "the law of the land."

That test was established by the opinion in the Hoboken Land & Improvement Co., case, where the court after careful consideration decided that the common law and statutes of England for centuries had established the validity of process similar to that there under consideration.

The Miedreich case is but another illustration of the same doctrine. The question there involved was whether one had been deprived of his property without due process, contrary to the Fourteenth Amendment, by a decision of the State Court that he could not impeach as false a sheriff's return of service in a proceeding under which his land was sold and by so impeaching the return set aside the proceedings had in the cause. One need only consider for a moment the great age of the rule of the common law as to the conclusiveness of the sheriff's return on process to justify the decision in the case. It is a rule that antedates Magna Charta. Apparently, there are precedents that carry us back at least five centuries in support of this rule. In 16 Columbia Law Review 281 *et seq.* will be found an article in which this question is fully considered, and in which it is shown that the rule in respect to the conclusiveness of a sheriff's return has been in force since the reign of William the Conqueror.

The due process clause in our Constitution was therefore never intended to affect the rule or restrict its application. It was in fact then a part of the "law of the land" and therefore consistent with due process.

D.

Ancient usage in England and the Colonies did not sanction the determination of one's rights in property, in an instance such as this, without notice to him.

It does not follow that because in a few instances, according to the settled usages and mode of proceedings existing in the common and statute law of England for centuries, notice was not an indispensable prerequisite to due process, or "the law of the land," that notice may be dispensed with, in an instance where, according to the common and statute law of England, the American Colonies and the States, prior to the passage of Torrens laws, notice and a hearing were always required.

The fact that during the last century, in countries where the Government is not restrained by constitutional limitations, land registration acts have met with the approval of the courts, is not an argument for the validity of a provision for conclusiveness in certificates of title in States whose agencies are prohibited by constitutional limitation from depriving persons of property without due process of law. Nor, for the same reasons, do we consider important the system of registration of titles in force in early times in countries other than England. Governmental power in such countries was absolute, while the written American Constitution is the result of a long struggle by English speaking people to place restraints upon the absolute power of the Government.

Whether the Australian system of land registration of titles is superior to other methods is not the question here. The question is whether that system, if put into operation in the States of the United States, must not be modified, in so far as the conclusive effect of the certificate is concerned, to meet the constitutional requirements of the due process clause of the Fourteenth Amendment.

It is argued that the Fourteenth Amendment does not prohibit a change in the laws. That we admit, but we submit that the statement of Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, at p. 338, is pertinent:

> "When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual."

We therefore submit that a change in the laws cannot be accomplished by State legislation, consistently with due process of law, where such change involves the denial or disregard of a fundamental principle protecting the citizen in his private rights and intended to guard him against the arbitrary action of government or government agencies. And we further contend that one of those fundamental principles is the right of the citizen to notice and an opportunity for hearing in any proceeding, whether administrative or judicial, the determination in which involves title to his property.

Some reliance is placed by appellees upon recording laws as furnishing authority for upholding Torrens Acts, but under recording laws one's title cannot be transferred to another without his consent by the Recorder, nor does one lose his title, except by failure to timely record his deed,—a personal omission,—or through the operation of a limitation law, or by due process of law.

We do not find in appellees' brief any mention of any instance in which in England, or in the American Colonies, or in the States, before the passage of Torrens Acts, there was in force any law, customary or written, making conclusive a certificate of title to real estate issued by a public officer, except possibly the one statute in Massachusetts referred to on pp. 57 and 58 of appellees' brief. As illustrating the unconstitutionality of such a law, we refer to the tax deed cases on pages 22-23 hereof.

The writer is unfamiliar with Massachusetts Colonial laws relating to real estate, and has been unable to ascertain whether the Massachusetts statute referred to merely operated as a grant from the Colony to the persons whose names were recorded in pursuance of the statute, or what construction was given to the statute, and whether notice was given, or whether the court into which the transcript was to be returned was a legislative or judicial body, and whether a hearing was permitted on the return in the court or not. Apparently, however, there was nothing in the statute which precluded any one from asserting at any time any rights he might have. But be that as it may, the one instance referred to is of too isolated and uncertain a character to lead one to the conclusion that it was a *settled* usage and mode of proceeding, and therefore consistent with due process of law. (See Twining v. New Jersey, 211 U. S. 78, 108.)

Many of the matters relied upon by appellees as affording warrant for the assertion that analogies may be found in the common law or the statutory law of England or the American Colonies for the *immediate* conclusiveness of Torrens Certificates, will be found, upon examination, to be but instances of mere limitation laws. For instance, a fine at common law is referred to as analogous, but a consideration of the method by which a fine was levied will illustrate at least two important differences, differences with respect to the very things of which appellants complain.

First: Fines were an effectual guarantee against forgery.

II. Pollock & Maitland, History of English Law (1895), 100.

III. Holdsworth, History of English Law (3rd Ed.), 245.

Second: As pointed out by Pollock & Maitland, *supra*, pp. 94-105, a freeholder could not be *disseized* without notice and opportunity to be heard.

See also Holdsworth, Historical Introduction to the Land Law (1927), 116.

The first essential of the fine was a writ in which all of the property to be dealt with must be mentioned. After the parties, one of whom must have been seized of the land, had been brought before the court by the sheriff, they stated the terms of their compact. Four justices at least should be present at the time the "concord" was entered into. The courts of those times were local courts, and the freeholders of the district were bound to attend them so that notice to all persons interested was thus obtained. Moreover, the fine was not binding until a year and a day after seizin had been given by the sheriff, a period copied from the law of the old Germanic nations. That protection is similiar to that usually accorded by statutes (including Torrens Acts with reference to *initial* registrations) allowing judgments obtained after notice by publication to be opened within a stated period of limitation by parties not originally appearing, but whose interests are sought to be bound.

II. Pollock & Maitland, History of English Law, pp. 95-105.

III. Holdsworth, History of English Law, pp. 236-245.

The procedure in the case of a fine was not dissimilar to the initial registration in a Torrens proceeding, and to that extent it is somewhat analogous. The above mentioned safeguards of a fine later were found not to be sufficiently stringent. By the statute of non-claim enacted in 1360 (34 Edward III. c. 16), it was provided that a fine should not affect the rights of persons not parties to the action, but in Henry VII's time (4 Henry VII c. 24) a fine again was made conclusive against all, *after five years,* but it probably could be levied only by proclamation, perhaps comparable to modern notice by publication.

III. Holdsworth, History of English Law, pp. 243-244.

The borough customs, also mentioned by appellees, were only methods of executing deeds of conveyance and were not in any sense assurances of title. And as shown by the arti-

cle in 19 Green Bag, 335, 338, the deed only attained binding effect after being proclaimed in open court and the inhabitants of the borough were charged with notice of the proceedings in such court.

The transactions in the instances above were not supervised by "an officer of the court," as stated by the appellees, but by the court itself, with either notice to all parties provided for, or with its equivalent, the inhabitants of the district attending the court.

It is also asserted that various incidents of tenure in the early land laws of England imposed burdens upon the tenant which historically justify the Torrens Act in providing for the conclusiveness of a certificate of title. But will it be asserted that in a country where the land owner is guaranteed due process of law by a written Constitution before being deprived of his property, and where a State can not even exercise its necessary power of taxation except after giving notice or affording a review (see authorities p. 27, *supra*) that the many charges or burdens mentioned in appellees' brief, and which were incidents of tenure to land in England in the early period of the common law, may be imposed by a State upon one who is an owner of his land in fee simple?

E.

The statute cannot be upheld as a limitation law, because it does not afford a reasonable opportunity to the party to be affected to assert his rights.

Certainly limitation laws were known to the common law, and we do not question the constitutionality generally of limitation laws. But one of the fundamental constitutional requirements of a valid statute of limitations is that it affords a reasonable opportunity to the party to assert his rights.

A limitation statute which does not do this is invalid as not affording due process of law.

Ochoa v. Hernandez Y. Morales, 230 U. S. 139, 161.
2 Cooley Constitutional Limitations (8th ed.) 760-765.

As Sections 40 and 42 of the Act here in question, do not, nor does any other section of the statute, fix a time within which the owner whose land has been wrongfully transferred to another by the Registrar may assert and protect his rights by appropriate action, they cannot be upheld as valid limitation laws under the authorities cited above. Indeed, giving Sections 40 and 42 effect as limitation laws, in a case such as this, would mean that a law could be upheld as a limitation law, though the act which gave rise to the necessity of invoking the protection of the courts also tolled the right to resort to the courts.

Reference is made in several instances by counsel for the Registrar to that part of the opinion in Tyler v. Judges of the Court of Registration, 175 Mass. 71, upholding the constitutionality of the provisions of the Massachusetts Torrens Act regarding transactions subsequent to the initial registration. The Massachusetts law provided that a registration procured by presenting a forged certificate or a forged deed or other instrument should be void. (175 Mass. 81; our original brief p. 14.) Under such a law appellants in this case would not be precluded by the Registrar's transfer. The Massachusetts law also provided that all of the business was to be done "in accordance with the rules and instructions of the court," and the court construed that law as requiring, if there was any question, it should be referred to the judge for decision. (175 Mass. 81.) It was with reference to such an Act that it was said in the opinion that, "The

Act shows throughout the intent that no one shall be concluded without having a chance to be heard, and, although some of its methods are new to this Commonwealth, we cannot say that the precautions as to notice are insufficient in substance or form." (175 Mass. 81.)

We submit, that the Massachusetts court did not mean by the statement in its opinion that "when land is brought into the registry system there seems to be nothing to hinder the Legislature from fixing the conditions upon which it shall be held under that system," (175 Mass. 81) that the Legislature could require a waiver of constitutional guarantees from one purchasing such land or that, in the case of a subsequent registration, a registered owner could, in case of an unauthorized transfer, be deprived of his property by the Registrar's action without notice and a hearing. The references in the opinion to the fact that the Act provided that a registration procured through forgery should be void and also to the fact that the Act throughout showed an intent that "no one shall be concluded without having a chance to be heard," preclude such a contention. That opinion, as we read it, does not afford justification for the assertion that a transfer by the Registrar contrary to the terms of the law, without notice or a hearing, binds the true owner, or that the Massachusetts Court ever intended to be understood as so holding.

CONCLUSION.

We submit that the opinion of the court below sufficiently shows that there was drawn in question the validity of the Sections 40, 42 and 46 of the statute, as construed and applied, on the ground that it was repugnant to the provision of the Federal Constitution prohibiting a State from depriving a person of property without due process of law, and that such question is a substantial one, and the Court, therefore, has jurisdiction of this appeal.

We further submit that it is manifest the statute, as construed and applied by the court below, does deprive appellants of their property without due process of law, and that the consent to the deprivation of constitutional rights which the court below implied from Sec. 46 of the Act cannot be given effect.

Therefore, the judgment below is erroneous and should be reversed.

Respectfully submitted,

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel.

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANTS

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Counsel for Appellants.

FRANKLIN E. VAUGHAN,
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BARNARD & MILLER PRINT, CHICAGO

(34,478)

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IN THE

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANTS.

I.

Opinion of the Court Below.

The opinion in the state court is reported in Eliason v. Wilborn, 335 Ill. 352; 167 N. E. 101; also copied in Record, p. 22.

II.

Jurisdiction.

Appellants' statement as to jurisdiction on appeal was heretofore filed in compliance with Rule 12. The subject is further considered on the merits in the Argument.

III.

Statement of the Case.

The case is one in which there is drawn in question the validity of a statute of Illinois on the ground of its being repugnant to the Fourteenth Amendment of the Constitution of the United States. The judgment of the Supreme Court of Illinois, which is the highest court of that state in which a decision in the suit can be had, sustained the validity of the statute. The case is therefore one which was subject to review in this Court on writ of error under Section 237 of the Judicial Code as amended (U. S. Code, Title 28, Sec. 344) under legislation in force when the Act of January 31, 1928, was passed, which substituted appeal for writ of error. (U. S. Code, Title 28, Secs. 861a, 861b.)

Appellants have filed with the clerk of this Court, as appendices to their statement as to jurisdiction on appeal, authenticated copies of appellants' reply brief and petition for rehearing filed below, in order to show with greater certainty that the federal question raised on this appeal was timely presented. (Appendices: Reply Brief, 8, 9; Petition for Rehearing, 7, 8, 9.) We think this sufficiently appears from the opinion itself (R. 22), but in view of the inadvertent reference in that opinion to the *Fifth* Amendment to the federal Constitution (R. 22), we thought best to bring to the attention of this Court, in the manner indi-

cated, the fact that appellants urged below that the statute, as construed and applied to appellants by the state court, is in violation of the *Fourteenth* Amendment to the federal Constitution because it deprives them of their property without due process of law.

THE QUESTION INVOLVED.

The state statute here involved is "An Act concerning land titles," approved and in force May 1, 1897, as amended, commonly known as the "Torrens Act." (Laws 1897, p. 141; Cahill's Ill. Rev. Stats. 1927, Ch. 30; Smith-Hurd Ill. Rev. Stats. 1927, Ch. 30.) The pertinent sections are hereinafter set out.

The federal question presented on this appeal is: Does that statute as construed and applied to appellants in this case by the court below deprive appellants of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution, when it is held that the statute makes a certificate of title, issued by the registrar of titles (a mere ministerial officer) without notice to the owner and based upon a forged deed, conclusive evidence of title against such owner in favor of a purchaser from the grantee in such forged deed?

HOW THE QUESTION ARISES.

Appellants, on July 30, 1926 (R. 1), filed their petition or bill in equity in the Circuit Court of Cook County, Illinois, to cancel two certificates of title to lands owned by them which had been issued by the registrar of titles of said county without notice to appellants, and to set aside the two deeds upon which such certificates were based. The first certificate was based on a forged deed purporting to have been made by appellants to one Jerome C. Napletone,

and the other upon a deed from said Napletone to appellees, the Wilborns, under which deed the Wilborns claim title.

Appellants' petition was filed in accordance with the provisions of Sections 93 and 94 of said Torrens Act and as therein authorized. Those sections expressly authorize the filing of such a petition by any person interested in registered land to obtain a cancellation of any certificate of title, memorial or other entry upon the register improperly issued or made by the registrar of titles. The proceeding authorized is in the nature of a bill to remove and cancel a cloud on title to registered land.

A demurrer was sustained to the petition and it was dismissed at appellants' costs. Judgment was entered accordingly (R. 13), from which appellants appealed to the Supreme Court of Illinois, the highest court of review in that state.

The Supreme Court of Illinois, in an opinion first handed down October 25, 1928, affirmed the judgment of the trial court. (Certified Transcript of R. 38-49.) Thereupon, appellants filed their petition for a rehearing, which was allowed (R. 16), and the case was reconsidered by that court at the June Term, 1929, at which time, June 19, 1929, the court adhered to the conclusions formerly reached by it and (one of the Justices dissenting), readopted and refiled its former opinion written by Mr. Commissioner Partlow (R. 17), and rendered judgment for costs against appellants in favor of appellees. (R. 26.)

The title to appellants' land, as shown by the pleadings (R. 1) was originally registered under said Torrens Act in Edward J. Haley and wife, on August 6, 1921. By *mesne* conveyances, the title afterwards became vested in appellants, to whom a certificate of title was issued by the registrar under said act, September 21, 1923. In May, 1926, Napletone, a stranger to the title, by false representations

as to his purpose in so doing, obtained from appellants their certificate of title and forged appellants' signatures to a deed purporting to be from appellants to himself, which deed, accompanied by said certificate of title, he filed with the registrar and obtained thereon a certificate of title in himself. A few days thereafter, Napletone conveyed the land to appellees, the Wilborns, who bought without actual notice of the forgery. The Wilborns then filed their deed, together with the certificate of title issued to Napletone based on the forged deed, with the registrar and obtained from him, after notice of the forgery (R. 14), a new certificate showing title in themselves, based on the deed from Napletone. It is these two last mentioned certificates and deeds which appellants sought to have canceled and removed as clouds on their title.

QUESTIONS DECIDED BELOW.

Two questions which controlled the decision in the case were presented and argued on the appeal before the Supreme Court of Illinois and each of them was considered and decided by that court:

First. Whether or not the statute, when properly construed, makes a certificate of title issued by the registrar, based on a forged deed and without notice to the owner whose signature is forged, conclusive evidence of title as against the owner in favor of a purchaser without notice.

The court below decided that it did, and so construed and applied the statute.

Second. Whether or not, as so construed, the statute denies due process of law and is repugnant to the Fourteenth Amendment of the federal Constitution.

The court below sustained the validity of the statute, as thus construed, and held that the statute did not deprive

appellants of their property without due process of law, basing its decision on the grounds:

(a) That the Act makes provision for the protection of any person wrongfully deprived of his land by giving him recourse to the "indemnity fund" provided by the Act, or an action against the county to recover his damages (R. 23-24); and

(b) That when one voluntarily submits his land to the operation of the Act, as in the case of an original registrant, or purchases land already under the Act, as in the case of appellants, he thereby consents, pursuant to the condition imposed by Section 46 hereinafter quoted, to be bound by *all* of its terms and provisions and cannot complain that the Act or any part thereof is invalid as violative of any right under the federal Constitution. (R. 22-23.)

Appellants contend that neither of these grounds can be sustained under the decisions of this Court.

The constitutional validity of the statute is the only ground on which rests the judgment of the court below and it is the only ground on which that court based its decision.

The court below made no attempt to uphold the constitutionality of the statute except on the grounds hereinabove noted. Unless one or both of these grounds can be sustained, appellants contend that the statute is clearly invalid because it deprives them of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution.

PERTINENT SECTIONS OF THE STATUTE.

The Illinois Act is substantially in the form adopted in a number of other states, which Act, in the main, is patterned after the Torrens System of land registration in

force in parts of England, Australia, Canada and New Zealand.

The sections of the statute material to the questions here involved are as follows:

Section 40:

"The registered owner of any estate or interest in land brought under this Act shall, except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all others except:

(1) Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land under the lease. The term lease shall include a verbal letting.

(2) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed.

(3) Such right of appeal, writ of error, right to appear and contest the application, and action to make counterclaim as is allowed by this Act."

Section 42:

"Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

Section 46:

"The bringing of land under this act shall imply an agreement which shall run with the land that the same

shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

Section 47:

"A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferee has the title or interest proposed to be transferred and is entitled to make the convey ance and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and folium in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled'."

Section 54:

"A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or lease not exceeding five years where the land is in actual possession of the lessee or his assigns, shall take effect only by way of contract, between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing

upon compliance with the terms of this act. On the completion of such registration, the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

Section 58, (omitting immaterial parts):

"In the event of a duplicate certificate of title being lost, mislaid or destroyed, the owner * * * may make affidavit * * * and the registrar, if satisfied as to the truth of such affidavit and the *bona fide* of the transaction, shall issue to the owner a certified copy of the original certificate * * * and such certified copy shall stand in the place of and have like effect as the missing duplicate certificate."

Note: The statute makes no provision for notice or hearing before the registrar in the matter of the transfer of title and the issuance of a new certificate based on such transfer.

IV.

Specification of Errors.

1. The Supreme Court of the State of Illinois erred in holding that Sections 40, 42 and 46 of the statute of the State of Illinois, entitled, "An Act concerning land titles," approved and in force May 1, 1897, as amended, (Laws 1897, p. 141; Cahill's Ill. Rev. Stats. 1927, Chap. 30), as construed and applied to appellants by that Court in this case were valid and not in contravention of the Constitution of the United States. (R. 30.)

2. The Supreme Court of the State of Illinois erred in holding that the said statute of the State of Illinois, as construed and applied to appellants by said Court in this case, did not deprive appellants of their property without due process of law and did not deny to appellants the equal

protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. (R. 30.)

3. The Supreme Court of the State of Illinois erred in holding that appellants, by voluntarily purchasing lands registered under the said statute of Illinois, waived their right to complain that any of the provisions of said statute operate to deprive them of their property without due process of law or to deny to them the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. (R. 30.)

5. The Supreme Court of the State of Illinois erred in holding that the certificate of title issued by the Registrar of Titles of Cook County, Illinois, to Jerome C. Napletone, based on a forged deed purporting to have been made by appellants to said Napletone, as grantee, and the certificate of title issued by said registrar to Charles Wilborn and Carrie S. Wilborn, appellees, were conclusive evidence of title against appellants and in favor of appellees and in affirming the judgment and decree of the Circuit Court of Cook County, Illinois, and entering judgment for costs against appellants. In so holding and entering judgment, as aforesaid, said Court deprived appellants of their property without due process of law and denied to appellants the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. (R. 31.)

V.

ARGUMENT.

Summary of the Argument.

POINT A. The statute of Illinois as construed and applied in this case by the Supreme Court of that state (which statute as so construed makes a certificate of title issued by the registrar, a mere ministerial officer, without notice to the owner and based on a forged deed, conclusive evidence of title against such owner in favor of a purchaser from the grantee in the forged deed) deprives appellants of their property without due process of law in violation of the Fourteenth Amendment of the federal Constitution.

POINT B. The so-called compensation provision in the statute (Secs. 101, 102) giving recourse to an "indemnity fund" or action for damages against the county by a person sustaining loss through the "omission, mistake or misfeasance of the registrar," is no answer to the constitutional objection, because the state may not lawfully take the property of one person and give it to another, even for a full compensation, except for a *public* use.

POINT C. If the guaranties under the Fourteenth Amendment have been infringed by the operation of the statute as construed by the court below, the registration of title to lands under the Act, or the acquisition of title to lands already registered, do not constitute such waiver or consent as will preclude appellants from asserting the invalidity of the unconstitutional provision of the statute.

POINT D. Cases holding that a person may waive a constitutional right or estop himself from asserting it, distinguished.

POINT E. The statute implies no consent on the part of a transferee of a registered title that a certificate of title based on a forged deed shall be conclusive in favor of a purchaser. That is a question which this Court has the right to determine (if such determination be deemed necessary in this case), and, in determining that question, this Court is not bound by the state court's interpretation or construction of the statute but must decide for itself the true construction of the statute for the purpose of ascertaining whether or not such consent was given.

POINT F. The holding of the court below that appellants, under the provisions of the Act, had waived a constitutional right, does not oust this court of jurisdiction.

POINT G. The only ground on which rests the decision below is the constitutional validity of the statute.

POINT A.

THE STATUTE AS CONSTRUED AND APPLIED IN THIS CASE BY THE SUPREME COURT OF ILLINOIS DEPRIVES APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

The statute (Secs. 40, 42, *ante* p. 7), as construed and applied by the court below, makes a certificate of title issued by the registrar (a mere ministerial officer) without notice to the owner and based on a forged deed, conclusive evidence of title against such owner in favor of a purchaser from the grantee in the forged deed. We do not believe, in view of the provisions of Sections 47 and 54 of the Act (*ante* p. 8) that the statute intended such result, but the court below so construed it. That court, however, made no attempt to uphold the constitutionality of the statute as so construed, except upon the grounds that the statute gives to the defrauded owner recourse to the "indemnity fund" or action against the county to recover his damages, and that when an owner voluntarily registers his title to lands, or when one buys lands already registered, he consents to be bound by every provision of the statute and thus waives his constitutional rights guaranteed by the Fourteenth Amendment. These grounds are next considered under Points B and C.

So far as we can learn, this is the first instance under our form of constitutional government that any court has ever held that a person, through no fault or wrong of his own, may by force of a statute have his property wrested from him and given to another by means of a forged deed. No doubt this may be done in foreign states which are uncontrolled by constitutional limitations such as are embodied in our Fourteenth Amendment; but, even in England, if we accept the statement of Niblack in his "Analysis of the Tor-

rens System," Sec. 135, p. 213, the English land owners "cried out vehemently against a statute [Act of 1875] which gave effect to a title founded on a forgery" and refused to put their lands under the Act. He says that the people "were more concerned about holding the lands they had than about an improved system under which they might take title to other lands," and that as a result of this protest and failure of the system, Parliament, in framing the Act of 1897, declared a registration founded on a forgery to be absolutely void for all purposes and gave to the person suffering loss by such void registration compensation from the indemnity fund.

The Torrens Acts of Massachusetts and Ohio likewise expressly provide that a registration of transfer of title "procured by the presentation of a forged duplicate certificate, or of a forged deed or other instrument, shall be null and void." (Genl. Laws, Mass., 1921, V. 2, Chap. 185, Sec. 62; Throckmorton's Ann. Code, Ohio, 1929, Sec. 8572-41.) In North Carolina and Tennessee the statute expressly excepts from the conclusiveness of a certificate of title cases where "registration has been procured through forgery." (N. C. Code, 1927, Sec. 2393; Hemingway's Ann. Code, Tenn., 1927, V. 2, Sec. 6154.)

It may also be of interest to quote from the same author his observations on the federal question under consideration. He says, (p. 213):

> "We have discussed the effect of the forgery of instruments respecting registered land as if the conditions of the law were the same in this and in foreign countries. In foreign countries the legislative power may declare that the production of the last duplicate certificate of title shall be conclusive authority to a registrar to make a new registration, and may declare also that a new registration on a transfer from the last registered owner shall be valid and shall be conclusive evidence of title. When it declares that a regis-

tration void for forgery shall become the root of a new title, in favor of a bona fide transferee for value from the owner whose certificate was issued as the result of the forgery, there is the end of it. But in this country there are constitutional limitations on the power of the legislatures to pass laws, and no law of a state may deprive any person of property without due process of law. * * * It may be that Section 38 of the California Act is constitutional and valid, but for the determination of this matter, and of many questions arising under Torrens statutes, we must wait until the Supreme Court of the United States has rendered its decision."

The California statute above referred to expressly makes a certificate of title conclusive though founded on a forged deed. This, we believe, is the only state in which the act in terms so provides. The constitutionality of that provision has not, we are informed, ever been passed upon by the California courts. The Supreme Court of that state did hold, however, in Follette v. Pac. L. & P. Corp., 189 Calif. 193, that the Torrens Act, if construed to make a certificate of title conclusive in favor of a purchaser against the holder of an unregistered easement who was not made a party to the original registration proceedings, violated the due process clause of the federal Constitution.

The Act under consideration provides for neither notice nor hearing in the matter of transfer of title to registered land and the issuance by the registrar of a new certificate of title based on such transfer. No opportunity is afforded the registered owner to protect his property, or even to be heard, in case of the wrongful or unauthorized action of the registrar in making such transfer and issuing a new certificate.

Section 47 (*ante* p. 8) prescribes the two essential conditions and prerequisites to authorize the registrar to make the transfer, viz.; the filing of the registered owner's deed

(i. e. *his* deed, *not* a forged instrument), and the surrender to the registrar of the owner's duplicate certificate of title.

Yet, notwithstanding the provisions of Section 47, if the registrar, acting negligently, arbitrarily or fraudulently and without authority of law and contrary to the provision of the statute, registers a transfer of the owner's title and issues a certificate of such transfer, based on a forged deed, or upon no deed at all, and with or without the production of the owner's duplicate certificate of title, such certificate of transfer is by this statute, as construed by the court below, made conclusive evidence of title against the owner in favor of a subsequent purchaser without notice. The effect of this holding is to take the property of the rightful owner and give it to another without notice to the former, without opportunity to defend his rights and without his day in court.

The effect of such a statute, we submit, is the taking of property without due process of law contrary to the Fourteenth Amendment.

No greater effect can be given to the forged deed, upon which the registrar acted in the instant case, than to a blank piece of paper. A forged deed is a nullity. No rights can be claimed under it. It is not even entitled to be received for record under general recording statutes, and if recorded affords no protection to one purchasing in reliance upon such record. (Pry v. Pry, 109 Ill. 466, 476; Marden v. Dorthy, 160 N. Y. 39, 54 N. E. 726, 731; 5 Thompson on Real Property, Sec. 4025, p. 13.)

If a certificate of title based on a forged deed—an utter nullity— is to be made conclusive in favor of a purchaser under Sections 40 and 42 of this statute, then it follows that any certificate issued by the registrar under *any* circumstances, without the presentation to him of *any* deed, duplicate certificate of title, or other document of *any* kind

or nature, is likewise conclusive. Such a construction of the statute makes the registrar the most powerful autocrat known to modern times. He may sit at his desk and, governed only by his whims and caprices, transfer registered titles to whomsoever his fancy may dictate. If the construction placed upon the Torrens Act by the court below is upheld, then purchasers from such transferees will hold the titles absolutely secure from successful attack and the true owners will have lost their lands without notice and without fault on their part. Such a result, we submit, is contrary to every established principle of private rights and distributive justice, and is violative of due process of law guaranteed by the Fourteenth Amendment.

It is, indeed, shocking to every sense of justice and to every conception of private rights that a man's property may by such means be taken from him—even his home which to him and his family may have a value, due to sentiment or associations, not to be measured in dollars and cents—without any notice or opportunity to be heard.

This Court, in Scott v. McNeal, 154 U. S. 34, 45, quoting from United States v. Cruikshank, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in Bank v. Okely, 4 Wheat. 235, 244, said that the Fourteenth Amendment was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." This statement is quoted by Judge Cooley in his work on Constitutional Limitations (8th ed. V. 2, p. 739) where he collects numerous decisions of this and other courts announcing the same rule. As said by Mr. Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capri-

ciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Hurtado v California, 110 U. S. 516, 535."

In Missouri Pacific Ry. v. Nebraska, 164 U. S. 403, 417, this court, citing cases, said:

> "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

It is well settled that legislation may, within certain limitations, declare that proof of one fact, or group of facts, shall constitute *prima facie* evidence of the main or ultimate fact in issue without violating the due process clause of the Fourteenth Amendment, but it may not be made *conclusive* of the rights of the person against whom it is raised. It was so decided in two recent opinions of this court delivered by Mr. Justice Butler, in Western & A. R. Co. v. Henderson, 279 U. S. 639, and Manley v. Georgia, 279 U. S. 1.

The case first cited involved the validity of a state statute declaring that a railroad company shall be liable for damages to person or property by the running of its trains, "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company", which was construed by the state court as permitting the presumption of negligence thereby created to be given the effect of evidence, to be weighed against opposing testimony and to prevail unless such testimony is found by the jury to preponderate. This court held that the statute, as so construed, was violative of the due process

clause of the Fourteenth Amendment, and at page 642 said:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. Manley v. Georgia, ante, p. 1, and cases cited."

In Manley v. Georgia, supra, at page 6, this court said:

> "If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Bailey v. Alabama, 219 U. S. 219, 233, et seq. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

The analogy between the cases last cited and the case at bar is apparent. In the instant case the statute making the registrar's certificate conclusive evidence of title in the Wilborns is even more far-reaching in denying to appellants their constitutional rights and in depriving them of their property without due process of law than were the statutes which this Court found violative of the Fourteenth

Amendment in the two cases last cited—for appellants are afforded absolutely *no* opportunity to defend their property rights by *any* showing, no matter how overwhelming, in *any* form of judicial proceeding. As the record discloses, when they sought to save their rights in the proceeding below, and showed by their petition that they had never parted with their title and that the certificate of the registrar did not truthfully set forth the state of title, they were met at the threshold by the proposition that the door of inquiry was closed by the statute. In other words, the court below held that the statute requires that appellants must lose their property by reason of the unauthorized act of a mere ministerial officer who was misinformed or deceived as to the facts, and that appellants must be denied a day in court in which to establish that they had never conveyed their title to anyone and thus repel any presumption based on the registrar's certificate that there had been a lawful transfer of title—all because that certificate was by the statute made *conclusive* evidence against them.

The practical effect of making the certificate conclusive evidence of title is to oust the courts of jurisdiction to hear and determine a justiciable controversy or even to inquire into the facts upon which the rights of the disputants are founded, thus operating to deprive an owner of his property without due process of law. The action of a mere ministerial officer is thus substituted for the determination of a duly constituted court, reached after notice and full opportunity to the opposing parties to be heard and to have their rights adjudicated in accordance with established rules and principles of law. No matter how arbitrary or contrary to those principles and to natural justice the action of the registrar may be, under this statute the courts are powerless to remedy the wrong.

The statute affords an owner no safeguard against the unlawful taking of his property.

We quote from the opinion below (R. 23):

> "After the title was registered in appellants it could not be registered in Napletone until the duplicate certificate to appellants was surrendered to the registrar. If section 47 had been complied with it would have been impossible for Napletone to have accomplished this fraud. The act erected a safeguard against a forged transfer being registered, by the requirement that no transfer should be registered unless the owners' certificate was produced along with the instrument of transfer."

This statement in the main is *incorrect*. The statute affords the owner no safeguard if, as construed by the court below, it makes the registrar's certificate of transfer conclusive and bars all further inquiry.

If, as held in this case, the fact that an owner has made no conveyance of his property affords him no safeguard, how, then, could his retention of his duplicate certificate do so? Under the statute (Sec. 47, *ante*, p. 8) the two requirements prescribed to authorize the registrar to make a transfer and issue a new certificate thereon are (1) the filing of the owner's deed, and (2) the surrender to the registrar of the owner's duplicate certificate of title. It is therefore idle to say that either requirement constitutes a safeguard if the failure to do either or both is no protection in law against the unauthorized act of the registrar in issuing a certificate of transfer without compliance with such requirements, and if such certificate, when issued to a purchaser without notice, is made conclusive. The owner's failure to make a deed or to retain custody of his certificate would, in fact and in law, constitute a safeguard and make it impossible to accomplish a fraud, *only* if the statute were construed to render a certificate void upon it being shown

that it was issued without such deed and surrender of the owner's certificate of title, as is the case in Massachusetts and in the other states above mentioned where the statute makes such a transfer void. In other words, the statute would furnish a safeguard only in case the conclusiveness of the registrar's certificate was made dependent upon his *authorized* action under Section 47 in the two respects above named.

It is possible, of course, that if Napletone had not obtained from appellants their certificate of title he might not have succeeded in accomplishing this fraud; but that does not follow from any provision of or safeguard afforded by the act. If, under this Act as construed by the court below, the registrar issues a certificate to a grantee under a forged deed, or without any deed, and without the surrender of the owner's outstanding duplicate certificate, or without any affidavit as to its loss, a purchaser from such grantee nevertheless gets good title, and this, in spite of the fact that the owner may have his duplicate certificate under lock and key.

We have also noted above (p. 9) Section 58 of the statute, which provides for the issuance of a certified copy of the certificate upon filing of affidavit of loss, etc., of the owner's duplicate original. Under this section, despite the utmost care and the actual possession of his certificate by the rightful owner, one intending to steal his land may forge an affidavit of loss, present it to the registrar and obtain a certified copy of the duplicate certificate, which copy, under the statute, has "like effect as the missing duplicate certificate." He may then forge a deed from the owner, present it with the new certificate, have the transfer registered and, upon conveying to a purchaser ignorant of these facts, take the owner's property from him without notice and without his act, fault or knowledge. He may

also accomplish the same result by forging an owner's duplicate certificate as well as the deed, or by fraudulently inducing the registrar to issue a new certificate without the production of *either* the outstanding certificate or affidavit as to its loss.

The court below was correct in saying, as quoted above, that "if section 47 had been complied with it would have been impossible for Napletone to have accomplished this fraud," but the court overlooked the fact that in order to have complied with section 47, it was necessary not only to file with the registrar the owner's duplicate certificate of title, but also *his* deed—not a *forged* one—as required by said section.

A certificate of title cannot always be conclusive.

Appellees may urge that it is highly desirable to establish a system of evidencing land titles which will absolutely protect a purchaser in expending his money at the time he acquires title; but we submit it is much more desirable that such system shall protect an owner in the possession and enjoyment of his property *after it has been acquired*. But, however much the advocates of such a system may desire to establish a method for the registration of title to lands whereby the title to any particular parcel will always be ascertainable by reference to a certificate issued by a state official, made by law conclusive, such desire must always be circumscribed by constitutional limitations intended to protect rights of paramount importance.

The preservation of constitutional guaranties is more important than any particular scheme or system of evidencing title to lands.

The Fourteenth Amendment was added to the Constitu-

tion to protect, among other rights, the possession and enjoyment of property after it has been acquired, and any system which defeats this object is neither desirable nor possible under our system of government.

Even if a system based upon the conclusiveness of the registrar's certificate under all circumstances were constitutionally possible, experience, in one country at least, has demonstrated its undesirability as shown by its history in England, where, after a trial, it was found necessary to amend the Torrens Act in 1897, so as to make a registration founded on a forgery absolutely void for all purposes. (*ante* p. 14.) And in our own country, four of the States which have enacted a Torrens statute have inserted therein a like provision. (*ante* p. 14.)

In re Bickel, 301 Ill. 484, at page 491, the court set forth various statements of the objects hoped to be attained by the Torrens System, and continued:

> "These general statements are the ideal which it was hoped the system would reach, but the practical question presented is how near the ideal may be approached in view of other established rules of property. The certificate of title is not always entirely conclusive. (In re Peters, 119 Minn. 96, 137 N. W. 390; Annotation, the Torrens Law, L. R. A. (1916D) 14 et seq.)."

If this court should hold with appellants in this case it is apparent from decided cases that it will not be the first to introduce an exception to the conclusiveness of a registrar's certificate or an element of doubt into the system. Already such certificates of title must be accepted with many qualifications and exceptions.

For example, in Hooper v. Haas, 332 Ill. 561, it was held that such a certificate was not conclusive in favor of a purchaser at an execution sale as against one claiming under an unregistered plat dedication. In Chicago & Riverdale

L. Co. v. Vellenga, 305 Ill. 415, it was held that such certificate was not conclusive as against an unregistered claim of mechanic's lien. The same conclusion was reached in Hacken v. Isenberg, 288 Ill. 589. In Follette v. Pac. L. & P. Corp., 189 Calif. 193, it was held that such certificate was not conclusive in favor of a purchaser as against the holder of an unregistered easement who was not made a party to the registration proceeding, and the court said further, that under those circumstances the provisions of the California Act making such certificate conclusive, violated the due process clause of the federal Constitution.

By the great weight of authority it is held that state *lis pendens* statutes do not apply to actions in federal courts. (Wilson v. Hefflin, 81 Ind. 35, 44; King v. Davis, 137 Fed. 222; Stewart v. Wheeling and L. E. R. R. Co., 53 Oh. St. 151, and cases there cited.) We submit therefore that even where no *lis pendens* notice has been filed with the registrar, no certificate of title can be conclusive in favor of a purchaser, as against rights arising under bankruptcy proceedings, Volstead Act proceedings or other proceedings, either in equity or at law, pending in the federal courts.

The foregoing illustrations demonstrate that under our present laws and federal Constitution, a certificate of title issued by a non-judicial officer, without giving parties adversely affected an opportunity to be heard, cannot be made conclusive under all circumstances in favor of a purchaser.

From all of the foregoing considerations, we submit that the Torrens Act of Illinois, as construed and applied to appellants in this case by the Supreme Court of that State, deprives appellants of their property without due process of law in violation of the provisions of the Fourteenth Amendment of the federal Constitution.

POINT B.

THE PROVISION OF THE STATUTE REMITTING APPELLANTS TO THE "INDEMNITY FUND" OR ACTION AGAINST THE COUNTY DOES NOT CURE THE CONSTITUTIONAL OBJECTION.

The so-called compensation provision in the statute (secs. 101, 102) giving recourse to an "indemnity fund" or action for damages against the county by a person sustaining loss through the "omission, mistake or misfeasance of the registrar," is no answer to the constitutional objection because property may not be lawfully taken from one person and given to another, even for a full compensation, except for a *public* use.

The opinion below, after referring to this provision of the statute, says (R. 24):

> "In Board of Education v. Blodgett, 155 Ill. 441, it was held that the deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away."

The opinion makes no further comment upon or reference to this provision or its effect on the question of the validity of the statute. The court, seemingly, was of the opinion that a citizen may not complain that his property is taken from him without due process of law, provided the statute which authorizes such deprivation affords him a remedy by way of an action to recover the *value* of his property. The court failed to differentiate between the substitution of one remedy for another remedy and the substitution of a remedy in damages for *property* taken without due process.

The Fourteenth Amendment was intended to protect every person in the ownership of property *in specie*. The Amendment does not provide that no person shall be de-

prived of his property without due process unless provision is made for giving to the owner an equivalent for the property wrongfully taken. Much property has a value to its owner far in excess of its actual market value. A home which has been enjoyed for more than a generation, a place of business in which the owner has conducted a successful enterprise for many years, have a value to their owners which is not to be measured by the ordinary rules for determining values in courts of justice. The Fourteenth Amendment would become a mockery, indeed, if a statute were held to be in consonance therewith which provided that a stranger may take for his private use such home or such place of business *without notice and without the consent of the owner,* provided only such statute shall contain some provision for giving to the wronged owner the market value of the property as and when such value may thereafter be determined in an action instituted by such owner.

However great may be the benefit, real or imaginary, to the people which a new statute may be hoped to secure, such statute cannot stand if it violates the provisions of the fundamental law. (In re Bickel, 301 Ill. 484, 491.) It was the very purpose of the Constitution to secure to all citizens certain fundamental rights which may not be invaded by law-making bodies whatever their motives or ideals. If the interests of all the people will in fact be benefited by a change in laws which cannot be made because of constitutional limitations, then such change can be accomplished only by amending the Constitution. Experience has taught us the wisdom of this safeguard.

A practically identical provision relating to compensation in the Ohio Torrens Act was before the Supreme Court of that State in the case of State v. Guilbert, 56 O. St. 575, wherein at p. 623-4, and with reference to this precise question, it was said:

"The terms of these sections of the act show that the fund is to be raised to indemnify those whose lands have been wrongfully wrested from them, under the earlier provisions of the act, and without due process of law. When the provisions of the constitution are applied to this penitential scheme, it at once becomes apparent that it is both inadequate and forbidden. * * *

"But property in all of its subjects is equally sacred under the protection of this section of the bill of rights. To permit its abrogation would equally expose all descriptions of property to spoliation. The section is an inviolable assurance to all owners of lands and chattels that, unless they are required for a public use, they may retain them in specie, placing upon them any estimate that may be suggested by judgment, sentiment or caprice; and it is not within the combined authority of the departments of the government of the state to say that the estimate is too high. * * *"

While the court below did not hold or even intimate that the statute could be sustained under the provisions of the Constitution of Illinois as an exercise of the power of eminent domain, nevertheless, we wish to comment briefly on that subject.

Although the result of making the certificate conclusive is to deprive appellants of their property, it cannot, we think, be considered as an exercise by a state of the power of eminent domain, any more than a statute which attempts to make a presumption conclusive. The effect in either case is not the physical "taking" of property by the state in any constitutional sense, but is merely to deny to a party the right to assert or establish his rights or ownership of property in a judicial proceeding brought by him for that purpose. The statute operates merely as an estoppel against the assertion of ownership—not the *taking* of property under the power of eminent domain.

It is merely the substitution of a claim or right of action

for damages for the property which has been taken from the owner by another, wrongfully and without due process of law. Expressed otherwise, it is compensation for the *theft* of one's property—not the taking or appropriation of that property for a public use.

Moreover, the question whether this statute as construed below can be sustained as an exercise of the power of eminent domain is not in the case, because:

(1) Under the Constitution of Illinois (Sec. 13, Art. 2) as construed by the Supreme Court of that State (People v. Smart, 333 Ill. 135, 137; Moore v. Drainage District, 266 Ill. 399), a citizen cannot be deprived of his property under the power of eminent domain until compensation for his property has not only been *fixed* but *first paid* to him.

(2) There is nothing in the opinion below indicating any intention of the State Supreme Court to overrule its former decisions above cited, or to hold that the taking of appellants' property could be justified, upon independent grounds, as an exercise of the power of eminent domain under the Constitution of Illinois. That court did not attempt to sustain the validity of the statute in question upon any such ground. The grounds of the decision are that appellants are precluded from questioning the constitutionality of the statute because of their supposed consent or waiver; and that, inasmuch as the statute gave them a *remedy* by way of action against the county, this remedy was a lawful substitution for their right of property which had been taken away, and therefore they could not complain of being deprived of their property without due process of law. (Opinion R. 24.)

(3) The law in Illinois being as above stated, it necessarily follows that the judgment below cannot be sustained on this appeal on the ground that the "taking" of appellants' property was a legitimate exercise of the power of

eminent domain, even though this Court should, without reference to the Constitution and laws of Illinois, hold that such a "taking" is, in general, the exercise of the power of eminent domain. To do so, would be to sustain the judgment below on a ground opposed to the Constitution and law of Illinois, which prohibit the taking of private property for a public use until compensation has first been fixed and paid. And, since the statute in question makes no provision for the fixing or payment of compensation in advance of the "taking," it cannot, in view of the grounds on which the court below based its decision, be sustained by this Court as a proper exercise under the Constitution and laws of Illinois of the power of eminent domain.

But, even considered as an assumed exercise of the power of eminent domain, inasmuch as the taking of appellants' property from them by means of the unauthorized registration and vesting it in appellees is for the latter's private use, the provision for compensation in no way legalizes the taking.

Private property cannot be said to be taken for a public use where there is no change in the use resulting from the taking—the use remaining private as before. The use to which appellants' property is now devoted is no different in kind or character, nor less private, than it was before. The transfer from appellants to appellees merely resulted in a change of private ownership—not a change in use.

The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. (Cole v. LaGrange, 113 U. S. 1.)

Judge Cooley, in his work on Constitutional Limitations (8th ed., V. 2, p. 1124) says that it is conceded on all hands (citing copious authorities), that a state cannot take the

property of one citizen and pass it over to another, *even for a full compensation*, except for a public use.

In Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 158, this Court held that, while there is no specific provision in the federal Constitution which acts upon the states in regard to their taking private property for any but a public use, under the Fourteenth Amendment a citizen is deprived of his property without due process of law, "if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain."

A case involving somewhat the same question was very recently decided by the Circuit Court of Appeals, Eighth Circuit, in Jones v. York County, Nebraska, 26 Fed. (2d) 623, 628. It was there held, as it was held in the *Ohio case* above cited, that losses to individuals sustained through omissions, mistakes or misfeasance of the registrar, could be paid only out of the "indemnity fund," and could not be collected from the people by means of a general tax levy, for the reason that such a tax would not be for a *public* use but solely for the private benefit of individuals who had sustained losses. After pointing out that the Torrens Act of Nebraska was neither mandatory nor all-embracing, and did not undertake to supplant the registry laws existing in that state, but was optional, etc., the court said:

> "The operation of the act is, therefore, not general, and a tax levy to reimburse those who have suffered loss thereby would fall upon any who have not assumed liability for such potential losses. The legislative action falls short of an exercise of the police power for the common welfare of all the people."

The court in its opinion quotes from the authorities, including Citizens' Savings & L. Assn. v. Topeka, 20 Wall. 655, to show that the power of taxation is limited to objects in their essential character public and not private, and

(quoting from the case last cited) "cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby."

The Illinois Act, like that of Nebraska, is not general throughout the state. It has been adopted only in Cook County. It is optional—not compulsory—and does not supplant the existing registry laws. (R. 22.) In fact but a relatively small portion, in value, of the lands in that county are registered under the Torrens Act.

But, even if the Act were both general and compulsory, applicable to all lands throughout the state or throughout any territorial division of the state, and assuming that the power of eminent domain extends to the mere taking of property implied from a change of ownership without regard to the character of any change in the use resulting from such taking, it would still require some stretch of imagination to discover a public use or purpose in a statute which protects a purchaser in acquiring a title based on a forged deed and then, when he has acquired it, suffers him to lose it by the same means. It comes pretty close to putting a premium on forgery.

It adds not one iota to the security or stability of titles, for a title so acquired is just as vulnerable in the new owner, in this respect, as it was in the former owner. In fact, under the Torrens Act as construed by the court below, the stability and security of titles is impaired by taking away the immunity from loss through forgery. Under it, a man may never truthfully say that he is still the owner of his home or other property, without first consulting the records in the registrar's office.

Clearly, a statute which sanctions the loss of title through forgery can serve no public purpose at all. It merely determines a conflict of private interests between the pur-

chaser who buys without notice of the forgery and the former owner whose deed is forged, by shifting the loss from the one to the other. It adds nothing to the stability of the title but creates an infirmity by making it a subject of larceny. No public purpose is subserved by a law which protects a *purchaser,* who has the opportunity before he buys of protecting himself, and affords no security of title whatsoever to that same purchaser when he becomes the *owner.*

The assurance to a purchaser of protection against a prior forgery is of doubtful value to him if the price he pays for such protection takes from him the assurance that he may keep his property after he buys it. Having become the owner, his own security and protection is no greater than those possessed by the former owner. In fact, it may be less because his loss through a subsequent forgery would involve, not only the land, but all improvements made by him on the land.

The provision for compensation may protect the purchaser who relies on the certificate of title, but who, by reason of the forgery, fails to get title. In his case no constitutional rights are impaired and he has no cause to complain if he recovers his damages caused by the error or wrongful act of the registrar. But not so with the owner whose property is arbitrarily taken from him without due process of law and given to another. Compensation by way of damages is no justification in his case. He has a constitutional right to retain his property in specie and it cannot be taken from him, "even for full compensation, except for a public use," and not even then, under the Constitution of Illinois, as above shown, unless compensation is fixed and paid before the taking.

POINT C.

IF THE GUARANTIES UNDER THE FOURTEENTH AMENDMENT HAVE BEEN INFRINGED BY THE OPERATION OF THE STATUTE AS CONSTRUED BY THE COURT BELOW, THE REGISTRATION OF TITLE TO LANDS UNDER THE ACT, OR THE ACQUISITION OF TITLE TO LANDS ALREADY REGISTERED, DO NOT CONSTITUTE SUCH WAIVER OR CONSENT AS WILL PRECLUDE APPELLANTS FROM ASSERTING THE INVALIDITY OF THE UNCONSTITUTIONAL PROVISION OF THE STATUTE.

Section 46 of the statute (*ante* p. 7) provides that "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof."

The court below held that appellants were precluded from questioning the validity of any part of the statute because they had consented to be bound by *all* of its terms and provisions under the conditions imposed by said section, and such consent was held to be implied from their having purchased lands registered under the Act.

There is thus squarely raised the question of the right of a state indirectly to impair constitutional guaranties by compelling a person to elect either not to exercise a right or privilege at all (in this case, the right or privilege to purchase and own registered lands) or, as the price to be paid for exercising such right or privilege, to waive the protection of the Fourteenth Amendment and consent to be bound by a statute which deprives him of his property without due process or denies to him the equal protection of the laws. The holding of the court below on this point is contrary to the principle announced by this Court in the cases hereinafter cited.

The law as laid down in these cases is that no validity or effect can be given to any consent or agreement of a person to surrender a right or privilege secured to him by the Constitution or laws of the United States, made or implied in obedience to a statute which requires such consent or agreement as a condition to the exercise of a right or privilege granted by such statute.

In the cases next cited below, this Court held that, while a state may prohibit a foreign corporation from transacting any local business within the state and may impose such conditions as it sees fit in granting such privilege, yet it may not, as a condition precedent to obtaining a permit to do a local business, require the corporation to surrender a right or privilege secured to it by the Constitution or laws of the United States—specifically, the right to remove a cause from a state to a Federal Court. In these cases it was held that no validity or effect could be given to such a statute nor *"to any agreement or action of the corporation in obedience to its provisions,"* and that the action of the corporation in entering the state and availing itself of the privileges granted by the statute—even to the extent of agreeing in writing to be bound thereby—did not preclude the corporation from asserting the invalidity of the unconstitutional provision of the statute.

Barrow Steamship Co. v. Kane, 170 U. S. 100, 110-1.

Southern Pacific Co. v. Denton, 146 U. S. 202, 207.

Barron v. Burnside, 121 U. S. 186, 200.

Insurance Company v. Morse, 87 U. S. 445, 451.

The recent case of *Power Co.* v. *Saunders*, 274 U. S. 490, 496, involved the constitutionality of a state statute which discriminated, in respect to the venue of actions, between domestic and foreign corporations. Counsel for the plaintiff in that case advanced the ground that the defendant

corporation "impliedly assented to the venue provisions by seeking and obtaining permission to do business within the State, the provisions being then on the statute book." This Court, answering that argument, said:

> "The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States. The principal cases are cited and reviewed in *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, 507, *et seq.*, and *Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583, 594, *et seq.* To them may be added the case of *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 468, where it was held that 'the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States.'"

The Minnesota statute involved in the *Cargill* case, cited *supra*, contained a provision (in substance the same as Section 46 of the Illinois Torrens Act) that "every person, company or corporation receiving such license *shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same.*" The case last cited would seem to be conclusive on this point.

In Western Union Telegraph Company v. Kansas, 216 U. S. 1, 35-36 and Pullman Company v. Kansas, 216 U. S. 56, 63, this Court applied the same principle to a statute which required a corporation of another state, as a condition of doing a local business in Kansas, to pay to the state certain graduated percentages of its capital stock. It was held that this requirement imposed a tax on property beyond the limits of the state, in violation of the due process

clause; that, thus, it was violative of the constitutional rights of the company, and that the right of the company to continue to do business in Kansas was not and could not be affected by this condition to which the corporation could not be compelled to consent.

The principle laid down in these cases was restated and reaffirmed in International Paper Co. v. Mass., 246 U. S. 135, 141, where numerous prior decisions were reviewed.

The same rule was applied in Hanover Ins. Co. v. Harding, 272 U. S. 494, 507, in which this Court held that a state may require, as a condition precedent to a renewal of a license of a foreign insurance company to do business in Illinois, that all valid laws of the state shall have been complied with, but that the state may not make compliance with a statute requiring payment of a tax past due and which is violative of the federal Constitution a condition precedent to the renewal of such license.

These cases involved the precise point under discussion. In most of them the judgment of the state court was based upon the proposition that the party assailing the constitutionallity of the statute was barred from doing so either by its express agreement made in obedience to such statute or by having availed itself of some of the provisions of the statute from which the state court implied a waiver of or consent to the relinquishment of a constitutional right. This Court, as above shown, expressly refused to adopt such a doctrine and reversed the courts below.

In the instant case the court below based its decision on the same proposition, holding that appellants were precluded from questioning the constitutional validity of any section of the statute, whether violative of the federal Constitution or not, because of their supposed "consent" implied from their purchase of lands which had been registered under the Act, and which consent to be bound by all

the terms of the statute was, by Sec. 46 thereof, attempted to be imposed as an agreement running with the land.

The court below stressed the idea that whatever might be the hardship of which appellants complain, it was one which they had voluntarily assumed, saying (Rec., 23): "They were under no obligations to buy, but when they did buy and registered their title they came under all of the provisions of the act and were presumed to know all of its terms."

This Court decisively disposed of such an argument in Frost Trucking Company v. R. R. Commission, 271 U. S. 583, 593, wherein the cases hereinabove referred to and many others are reviewed. Speaking through Mr. Justice Sutherland, this Court said:

> "Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden. * * * It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that *it may not impose conditions which require the relinquishment of constitutional rights.* If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." (Italics ours.)

The above case involved a statute of California requiring *private* carriers using the state highways to procure a certificate of public convenience and necessity and to

assume the duties and burdens of a *common* carrier. This Court held the statute invalid on the ground that, even assuming that the use of its highways by private carriers for hire is a privilege which the state may deny, it cannot constitutionally exact as the price for the exercise of that privilege the unconstitutional condition that a private carrier shall assume against his will the burdens and duties of a common carrier. This Court answered the contention urged in that case that the act of the carrier was a voluntary one and that he was not compelled against his will to assume the burdens of a common carrier, by the language above quoted.

It is appropriate at this point to note the far reaching operation and effect of section 46 of the statute if it is to be given effect as held by the court below. This section not only provides that the bringing of land under the Act shall imply an agreement running with the land that the same shall be subject to all the terms of the Act as it stood at the time of its passage, but also shall be subject to "all *amendments* and *alterations* thereof." So that, whenever and however the Act may be hereafter amended, regardless of the extent to which such amendment may deny equal protection of the laws or other constitutional guaranties, the owner of registered property is without remedy and must be held to have consented in advance to all such unconstitutional amendments. Indeed, the extent to which the State may go in such case is without limit if this doctrine of consent or waiver is to be given effect. For example, if this Act should at any time hereafter be amended so as to provide a different rule or principle of taxation of registered lands from that which is applied to non-registered lands; or should the Act be amended so as to provide that no suit or action affecting registered lands should be brought in any court, but that all con-

troversies arising in relation thereto and all proceedings brought for condemning such land for public use, should be conclusively determined, with or without notice to the owner, by some ministerial state officer or other person designated, the owner would, under the theory of waiver and consent advanced in this case, be without remedy, and rights secured to him by the Fourteenth Amendment would avail him nothing.

There is still another aspect to this question, which in the instant case is of even greater importance than the one above considered. It is this: The appellants were not the original registrants. Their only act from which any consent or waiver can be inferred was in purchasing property already registered under the Torrens Act. Such acquisition is more than a mere privilege granted by the State; it is a right or privilege guaranteed by the Fourteenth Amendment to the federal Constitution. The State is therefore without power to condition the exercise of that constitutional privilege by appellants upon their consent to waive the other constitutional privilege likewise granted them by the Fourteenth Amendment, namely, that their property, when so acquired, shall not be taken from them without due process of law.

Privileges and immunities, as used in the Fourteenth Amendment, include "the right to acquire and possess property of every kind." This definition of Mr. Justice Washington was quoted with approval in Maxwell v. Dow, 176 U. S. 581, 589. It was again adopted in substance in Paul v. Virginia, 8 Wall. 168, 180, and in Ward v. Maryland, 12 Wall. 418, 430. Judge Cooley, in his work on Constitutional Limitations, (8th ed. V. 2, p. 821) says that the privileges and immunities guaranteed by the Fourteenth Amendment include "the right by the usual modes

to acquire and hold property and to protect and defend the same in the law."

This right to acquire property, like other rights, is subject, of course, to lawful regulation by the State, but may it be indirectly impaired under the guise of consent or waiver by compelling a person to elect either not to exercise the right at all or to be bound by provisions in such regulatory statute which deny equal protection of the laws or take property without due process of law? The question was answered by this Court in the language of Mr. Justice Sutherland in Frost Trucking Co. v. R. R. Com., *supra,* at page 593:

> "If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion."

May a State lawfully say to a citizen that if he wishes to exercise his constitutional right to acquire property he may do so provided he consents that when so acquired it may be taken from him without due process?

In the exercise of the police power, the subject of many occupations may be licensed and regulated by the State, but may the State lawfully provide that any person so licensed to follow a given occupation shall have no right to sue in any court in respect of any claim or matter arising out of such occupation, and that all such claims shall be determined by arbitration, with or without notice? And may it be urged in such case that the person, by obtaining a license and acting under such statute, thereby waives his constitutional rights and consents that he may be so denied the equal protection of the laws or that his property may be taken from him without due process?

And so it is with one who desires to purchase property,

the title to which may be registered under the Torrens system, or any other system for that matter. Must such person either forego his constitutional right to acquire the property if the owner is willing and able to sell it, or be compelled in case he does so acquire it to waive other constitutional guaranties? If so, then a new method has been discovered by which a State may (as Mr. Justice Sutherland pointed out in the excerpt last quoted) indirectly destroy all constitutional guaranties by means of the "consent route," by compelling a person to waive one constitutional privilege in order to exercise another. By such means, statutes which regulate or concern the subject of contracts, conveyancing, occupations, common pursuits, and the like, may not be held invalid regardless of how and to what extent they may impair or take away constitutional guaranties, because of the theory announced in the opinion of the court below and applied in this case that one who voluntarily acts or proceeds under such a statute will be held to have consented to be bound by all of its terms and thereby shall be deemed to have waived the right to urge the unconstitutionality of any of its provisions, which waiver or consent is contained either expressly or impliedly in the statute itself. If this doctrine is to prevail, then, as has been often said by this Court, there is no limit to the power of the State to take away and impair the rights secured by the Fourteenth Amendment.

It is no answer to say that a person is not required to purchase property registered under the Torrens system. It is possible, though not probable, that all lands may become registered under that system; but whether so or not, a person has as much right under the federal Constitution to acquire property registered under that system as any other property. His right to acquire and own prop-

erty may not be determined by the circumstances under which title to the property is evidenced.

As said by Mr. Justice White in Pullman Co. v. Kansas, 216 U. S. 56, p. 70, "The controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly." And, as said by this Court in the *Frost case, supra,* at page 594, "If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

We have shown by the decisions of this Court that the State cannot exact as the price for the exercise of a mere privilege, which the State may grant or withhold at pleasure, the waiver of a right or immunity guaranteed by the Fourteenth Amendment. If the State may not do this in respect of a privilege which it may deny altogether, there is a much weightier reason why it cannot do so in respect to the exercise of a right or privilege guaranteed by the federal Constitution.

POINT D.

CASES HOLDING THAT A PERSON MAY WAIVE A CONSTITUTIONAL RIGHT OR ESTOP HIMSELF FROM ASSERTING IT, DISTINGUISHED.

In the reply brief filed by the registrar to Appellants' Statement as to Jurisdiction on Appeal a number of cases are cited in support of the general proposition that a person may under given circumstances waive a constitutional right or estop himself from asserting it. We submit that these authorities are not applicable here, and are not at all inconsistent with the principle announced by this Court and applied in the numerous cases we have cited above.

The cases relied on by appellees fall into two classes: the first, those where a party has himself invoked the jurisdiction of a court or other constituted authority pursuant to the provisions of a statute and has obtained the exercise of such jurisdiction, and, being dissatisfied with the result, has sought to escape from it by asserting the invalidity of the statute authorizing such proceeding. The second class consists of those cases governed by the general equitable principles of estoppel *in pais*. Both classes, however, are limited in application to a waiver by the party of such right or an estoppel arising against him to assert it in a present specific instance and not, as said by this Court in Insurance Co. v. Morse, 87 U. S. 445, 451: "to forfeit his rights at all times and on all occasions, whenever the case may be presented."

The instant case could fall into one or the other of these classes only under circumstances such as the following: the first, if appellants had been allowed a hearing on the merits upon the issues raised by their petition and being dissatisfied with the decision in such proceeding, had then sought to escape the results of their own action by asserting the nullity of the decree because the provisions of the statute authorizing such proceeding were unconstitutional; or, the second, if appellants had received any part of the consideration paid by appellees for the purchase of the property, or had stood silently by, knowing the facts, without asserting their rights and had permitted appellees to complete the purchase and pay out their money, or had been guilty of any other act or omission upon which appellees relied to their prejudice, which conduct would have made it unjust and inequitable to permit appellants to obtain the relief sought by their petition. In the instant case, however, no such supposed facts in truth exist.

A person may voluntarily agree in a specific concrete

case to waive a constitutional right in respect to that particular case, as where a corporation agrees not to remove a certain case to a federal court or agrees to pay a certain unconstitutional tax; but, as held by this Court in the cases we have cited above, no such agreement or consent can be compelled or imposed by a state statute, or implied from the acts of such corporation proceeding under or in obedience thereto; nor can such corporation be held to have consented not to remove a case to a federal court or to pay an unconstitutional tax simply because it has come into the state and availed itself of the privileges granted by the statute; nor is a general waiver of a constitutional right, applicable at all times and on all occasions, valid and enforceable.

As this Court said in Insurance Co. v. Morse, 87 U. S. 445, at page 451:

> "A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's* Case, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. *He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.*" (Italics ours.)

The distinction between the cases relied upon by appellees and the instant case is readily apparent. In those cases the waiver was purely voluntary—not, as in the instant case, in the *removal* and *tax cases* and in the *Frost Trucking Co. case* (271 U. S. 583, 592, 599) coerced by the

State by compelling a person to elect, either not to exercise the right or privilege granted by the statute at all, or, as the price of exercising such right or privilege, to waive the protection of constitutional guaranties. Moreover, in those cases the waiver which was given effect related only to some present, particular, concrete matter and was not a waiver which by the Court's decision was made applicable at all times and under all circumstances whenever occasion might arise. Such cases therefore in no manner support the conclusion reached by the court below in respect to the supposed waiver alleged to be contained in the statute in the instant case.

We believe it will be plain to this Court that the principle and rule established in the *removal* and *tax cases* and in the *Frost case* and in *Power Co.* v. *Saunders* above cited—and not the one applied in the cases relied upon by appellee—control the decision of the case at bar.

POINT E.

THE STATUTE IMPLIES NO CONSENT THAT A CERTIFICATE OF TITLE BASED UPON A FORGED DEED SHALL BE CONCLUSIVE IN FAVOR OF A PURCHASER.

The court below held that by Section 46 of the statute a transferee of a registered title consents that any certificate issued by the registrar, even though based upon a forged deed, shall be conclusive against the former owner in favor of a subsequent purchaser, and that the transferee thus waives his right to complain that the Act, as construed and applied by the court below, is unconstitutional. We have shown, we think, that such consent, even if given, is invalid and not binding upon these appellants.

We wish here to urge that under a proper construction of the Illinois Torrens Act, a transferee of a registered

title does not in fact consent that a certificate of title based upon a forged deed shall be conclusive in favor of a purchaser, and, further, that while the construction of the statute holding such certificate conclusive is binding on this Court when considering the question as to whether the statute as construed and applied by the state court deprives appellants of their property without due process of law, this Court is not bound by the construction of the statute by the state court when considering the question as to whether appellants have consented to the statute in such manner that they are estopped or have waived their right to complain against the statute as depriving them of their property without due process of law.

(a)

In this case, when considering the question of whether appellants have consented to be bound by all the terms of the Torrens Act and therefore have waived their right to complain that the statute deprives them of their property without due process of law, this Court is not bound by the state court's construction of the statute, but must decide for itself the true construction of the statute.

In the instant case, if, in fact, by the terms of the Act appellants as transferees of the title have been compelled to agree that *any* certificate of title issued by the registrar, even though based on a forged deed, shall be conclusive in favor of a purchaser, then such agreement must be found in the terms and provisions of the statute.

The contention that appellants have waived their right to complain or are estopped against complaining of the provisions of sections 40 and 42 of the Act, is based upon the assumption that such an agreement is found in the terms and provisions of the statute. If the existence of such

agreement is to be made the test by which the validity of the statute must be determined, we respectfully submit that it is the duty of this Court, following the rules laid down in the cases mentioned below, to ascertain for itself whether under the provisions of the statute any such agreement was in fact made in behalf of these appellants as transferees of the title.

Where a question is raised whether a state has violated the constitutional provision prohibiting the impairment of the obligation of contracts, this court will determine for itself the existence, construction and validity of the alleged contract even if this involves the construction of statutes. (N. Y. Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 186; Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8.) If this power did not exist in this Court, then such unconstitutional provision could always be evaded by the state courts giving such construction to a contract or such decisions in respect to its validity as to render the powers of this Court of no avail. (Delmas v. Insurance Co., 81 U. S. 661, 668; Bridge Proprietors v. Hoboken Co., 68 U. S. 116, 145.)

This same rule has been applied by this Court in other cases where the federal right set up in the state court has been wrongly denied and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost.

Truax v. Corrigan, 257 U. S. 312.

Scott v. McNeal, 154 U. S. 34.

Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8.

In Truax v. Corrigan (257 U. S. 312) Mr. Chief Justice Taft, speaking for the Court, at page 324, said:

"The facts alleged are admitted by the demurrer, and in determining their legal effect as a deprivation

of plaintiff's legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. Mackay v. Dillon, 4 How. 421; Dower v. Richards, 151 U. S. 658, 667. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. Bailey v. Alabama, 219 U. S. 219, 238-239; Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418; Mugler v. Kansas, 123 U. S. 623, 661; Corn Products Refining Co. v. Eddy, 249 U. S. 427, 432. In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact *or has been waived or lost,* this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591, 593; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668, 669; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611. * * * In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard." (Italics ours.)

In Scott v. McNeal, 154 U. S. 34, letters of administration had been issued by the Probate Court of Thurston County, Washington, on the estate of a man in fact alive, but presumed to be dead by reason of his long absence. The administrator was authorized to, and did, sell certain real estate belonging to the supposed decedent. Afterward the latter appeared alive and instituted suit to recover his

property. The state court construed the statute and held that the judgment of the Probate Court was not void and that the supposed decedent had not been deprived of his property without due process of law. In reviewing this judgment, this Court, in defining the scope of its powers to review the decision of the state court, at page 45 said:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. *In every such case, this court must decide for itself the true construction of the statute.*. Huntington v. Attrill, 146 U. S. 657, 683, 684; Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486, 492-495." (Italics ours.)

(b)

The Illinois Torrens Act when correctly construed does not imply an agreement on the part of a registered owner that a certificate of title based upon a forged deed shall be conclusive in favor of a purchaser.

The supposed agreement or consent on the part of a registered owner, upon which the court below bases its decision, that *any* certificate of title issued by the registrar shall be conclusive in favor of a purshaser, is to be found, if at all, in Section 46 of the Act. (*ante* p. 7.) While other parts of the act aid in determining the true meaning of Section 46, no other provision of the Act specifically deals with the question of consent.

That section provides that "the bringing of land under this act shall imply an agreement, which shall run with the land *that the same shall be subject to the terms of the act and all amendments and alterations thereof* * * *."

The agreement contained in Section 46 is clearly intended to bind a subsequent transferee, not by the terms of any *one* section construed separate and apart from the others, but *by all the terms* of the Act construed together.

Section 42 (*ante*, p. 7) particularly deals with the protection of purchasers of registered titles. Its essential parts are as follows:

> "Except in case of fraud and *except as herein otherwise provided*, no person taking a transfer of registered land * * * from the registered owner shall be held to inquire into the circumstances under which, or the consideration for which such owner or any previous registered owner was registered, or be affected with notice actual or constructive, of any unregistered trust, lien, claim, demand or interest."

That is, the agreement said to be implied in Section 46 is not that *any* certificate of title issued by the registrar under any circumstances shall be absolutely conclusive in favor of a purchaser, as the court below held, but a qualification and exception to the conclusiveness of the certificate is plainly stated in Section 42. The certificate is to be conclusive "except in case of fraud *and except as herein otherwise provided.*"

In construing Sections 40, 42 and 46, and in reaching the conclusion that by the terms of the Act a transferee has consented that the registrar's certificate in all cases shall be conclusive in favor of a purchaser, the court below failed to notice this exception contained in Section 42 and also overlooked and failed to give any effect to Sections 47 and 54 of the Act.

Sections 47 and 54 (*ante*, p. 8) prescribe the con-

ditions under which the registrar is empowered to register transfers and to issue new certificates of title. Unless these conditions exist, the registrar is without power to act, and any attempted action taken by him is without authority of law, contrary to the statute and a nullity. His unauthorized act, like a judgment of a court entered without jurisdiction, is wholly void. (People v. C. & N. W. Ry. Co., 270 Ill. 232.)

Sections 47 provides (italics ours):

> "A *registered owner* of land desiring to transfer his * * * interest therein * * * *may execute* to the intended transferee *a deed or instrument of conveyance* * * *. And, upon filing *such* deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title * * * he shall make out and register * * * a new certificate * * *."

Section 54 provides that a deed of registered land

> "shall take effect only by way of contract between the parties thereto, and *as authority to the registrar to register the transfer* * * * *upon compliance with the terms of this Act.* On the completion of such registration, the land * * * shall become transferred * * * according to the purport and terms *of the deed* * * *."

The Act thus requires two things to concur *before* the registrar acquires jurisdiction—power to act at all—viz., delivery of the owner's genuine deed and his duplicate certificate of title. The provisions of the Act are comparable to various statutes requiring several things to be done before a court may lawfully act, such as posting *and* mailing of notices, publication *and* mailing notices, filing bond *and* certified copy of order of appointment, filing of petition *and* service of notice, etc. The omission of one of the two requirements defeats the jurisdiction even of courts of general jurisdiction, and it can hardly be contended that

a similar rule will not be applied to the jurisdiction of a mere ministerial officer.

The registrar is a non-judicial officer vested with limited powers. They are those, and only those, granted by the statute. They cannot be extended by presumption or implication, *as might be the case with a court of general jurisdiction.* The very existence of any power in the registrar to register transfers and to issue new certificates depends, by the terms of the statute itself, upon the execution *by the registered owner* of a deed and the presentation of *that* deed—not a void writing executed by a stranger—to him. In other words, the Act protects the owner against theft of his title by forgery, and *in terms makes the genuine deed of the registered owner the only authority to the registrar to register any transfer.* Thus the Act itself furnishes no more authority to the registrar to act upon the presentation of a forged deed than upon the presentation of a mere blank sheet of paper—or, indeed, of nothing at all.

In Chicago Railways Co. v. Commerce Commission, 336 Ill. 51, the Supreme Court of Illinois, in holding void a certificate of convenience and necessity issued by the State Commerce Commission under conditions which did not conform to the provisions of the statute creating the Commission and defining its powers, at page 70 said:

> "The Commission is created by Statute and has no powers except such as are conferred by the act creating it. It cannot change any condition fixed by the legislature."

We submit therefore that a certificate of title issued by the registrar, based upon a forged deed, is absolutely void.

By executing a deed and delivering it to the registrar (together with his duplicate certificate) the registered owner thereby enters his appearance in the matter of the transfer of title, has notice of the entire proceeding and

an opportunity to protect his rights. But when the transfer is made and a new certificate is issued based upon a *forged* deed, the true owner has no notice of the transaction and no opportunity to be heard. No provision for notice is contained in the Act. By Section 42, the purchaser is told that he may rely upon the certificate of the registrar "except in case of fraud and *except as herein otherwise provided.*" The purchaser is thus given a clear warning, that before relying upon the certificate, he must read the other terms and provisions of the Act and ascertain therefrom the meaning of the exception contained in Section 42.

Upon reading Sections 47 and 54 the purchaser is informed that the registrar is authorized to make a transfer of the title and to issue a new certificate of title *only* when a *genuine* deed of the owner is presented to him, and that without such genuine deed the registrar is not authorized to act and that, therefore, any certificate issued by him evidencing a supposed transfer of title without the authority of a genuine deed is void. Thus, while a purchaser is not to be affected by "any *unregistered* trust, lien, claim, demand or interest" (Section 42) or even obliged to see that the consideration for any previous transfer has been paid (the prior owner having presented *his* deed to the registrar and authorized the registrar to act, is required to protect his rights in all such matters) the intending purchaser is required before acting upon a certificate of title to ascertain that such certificate was issued by the registrar in conformity with the Act; *i. e.*, based upon the authority of a genuine deed executed by the former owner. The registered owner cannot under any theory be said to have agreed that *any* registration of transfer or issuance of a new certificate affecting his title which the registrar may make without authority of the statute, based upon a *forged* deed or upon no deed at all, in *contravention* of Sections 47

and 54, shall have the effect prescribed by Sections 40 and 42. *It is only such records and such transfers as are made pursuant to and under the authority of Sections 47 and 54 that are entitled to effect as evidence of title prescribed by Sections 40 and 42;* and it is to such *lawful* records and certificates, and *only* to them, that the owner can be said to have agreed to be bound.

This Court said in Scott v. McNeal, 154 U. S. 34, at page 46:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court or without notice to the party."

It must necessarily follow that no act of a ministerial officer is valid, if performed without authority and without notice to the party to be adversely affected.

In ascertaining the true meaning of these sections of the Torrens act, and the true extent of the transferee's consent, the matter of notice in respect to any transfer which may be made by the registrar under the provisions of the Act is therefore important and controlling.

Possibly a statute may provide that when an owner of registered property presents to the registrar his genuine deed and duplicate certificate, the registrar may transfer the title and issue a new certificate to the transferee (Sections 47 and 54) and that such certificate shall have the conclusive effect stated in Sections 40 and 42. In such case the registrar by reason of the presentation to him of the genuine deed of the owner and his certificate acquires jurisdiction of both the subject matter and the person of the owner and therefore the result stated in Sections 40 and 42 in respect to the conclusiveness of the new certificate may follow.

But when the registrar acts under a forged deed, both

elements of jurisdiction are wanting. The registrar does not acquire jurisdiction of the subject matter, because authority to act in respect to a transfer is only conferred upon him when a genuine deed of the owner is presented to him (Sects. 47 and 54). The registrar does not acquire jurisdiction over the person of the owner because no notice is given to such owner, and the owner does not enter his appearance in the matter of the transfer, as he does when he presents his own deed to the registrar and requests the transfer to be made.

If then, the court, in construing the Torrens Act, is to yield to the contention that a transferee by the terms of the Act has agreed that he may be deprived of his property by means of a forged deed and without notice, specific authority to that effect must be found in the Act itself. If it be said that there is an implied agreement on the part of the transferee that his lands "shall be subject to the terms of the act and all amendments and alterations thereof," it would be no warrant for holding that the transferee has consented that the specific provisions of Sections 47 and 54, which alone confer upon the registrar power to transfer a title, may be wholly disregarded and that he, the owner, may be deprived of his property by means of a forged deed and without notice in order that Sections 40 and 42 may give to a *void* certificate of title an effect which is inconsistent with the spirit and with the manifest provisions of the act when construed as a whole.

We respectfully submit that when the statute is correctly construed, it will be found that a transferee of a registered title has not agreed by the terms of the Act that his title may be taken from him by means of a forged deed or that a certificate of title issued by the registrar based upon a forged deed shall be conclusive in favor of a purchaser.

POINT F.

THE HOLDING OF THE COURT BELOW THAT APPELLANTS, UNDER THE PROVISIONS OF THE ACT, HAD WAIVED A CONSTITUTIONAL RIGHT, DOES NOT OUST THIS COURT OF JURISDICTION.

The registrar contends (p. 24 of his petition to appear, etc.) that the court below having decided that appellants, by force of the statute, had consented to be bound by all its provisions and thus had waived their constitutional right here involved, no federal question is presented on this appeal. He cites but two cases in support of his contention, viz., Pierce v. Somerset Ry., 171 U. S. 641, and Eustis v. Bolles, 150 U. S. 361.

Neither of these cases, we contend, is in point. Both cases involved an estoppel *in pais;* in the *Pierce case* (p. 648) based upon laches and acquiescence—in the *Eustis case* (p. 368) upon acceptance of money paid pursuant to the award subsequently assailed. Furthermore, both of these cases involved a waiver only in a specific pending matter, and not a general waiver in all cases and under all circumstances, which the court below in the instant case held was imposed by the Torrens statute.

Moreover, this Court, speaking upon this subject in a later decision (Truax v. Corrigan, 257 U. S. 312, 324) in an opinion by Mr. Chief Justice Taft, said:

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact *or has been waived or lost,* this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. *If the rule*

were otherwise, it almost always would be within the power of a state court practically to prevent a review here. Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591, 593; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668, 669; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611." (Italics ours.)

The right of this Court to review the decision below and to pass upon the federal question concerning the validity of the statute is governed, we submit, by the rule announced and applied by this Court in the numerous *removal* and *tax cases* above cited by us. In all of those cases this court took jurisdiction, notwithstanding that all of them, with two exceptions, were reviewed on writ of error from state courts in which the validity of the statute had been sustained by the state courts upon the ground, among others, that the complaining corporation had, by voluntarily availing itself of the privileges granted by the statute—in some instances having agreed in writing pursuant to the terms thereof not to remove any case to the federal court—waived the right to assail the constitutionality of such statute.

POINT G.

THE ONLY GROUND ON WHICH RESTS THE DECISION BELOW IS THE CONSTITUTIONAL VALIDITY OF THE STATUTE.

While, as we have pointed out (*ante*, p. 21), the court below was in error in supposing that it was within the power of appellants under this statute to prevent this fraud by retaining possession of their duplicate certificate of title, nevertheless that court did not base its decision, independent of the statute, upon any equitable ground or principle of general or local law that appellants should lose their title because of any negligence or other act on their part in suffering their duplicate certificate to get out of their possession. The opinion contains no intimation that, independent of the provisions of Sections 40 and 42 (which sections as construed made the certificate issued to Napletone conclusive evidence of title in favor of appellees), the court would have decided adversely to appellants because they suffered Napletone to obtain possession of the duplicate certificate. To the contrary the opinion expressly states (R. 22) that the Wilborns "took a good title *unless the statute is unconstitutional.*" Therefore, the only ground on which rests the decision below is the constitutional validity of the statute as construed and applied in this case.

CONCLUSION.

This case is one in which there is drawn in question the validity of a statute of Illinois as construed and applied by the Supreme Court of that State, on the ground that it is repugnant to the Fourteenth Amendment of the federal Constitution, and we respectfully submit that the federal question involved is a substantial one and that this court has jurisdiction of this appeal.

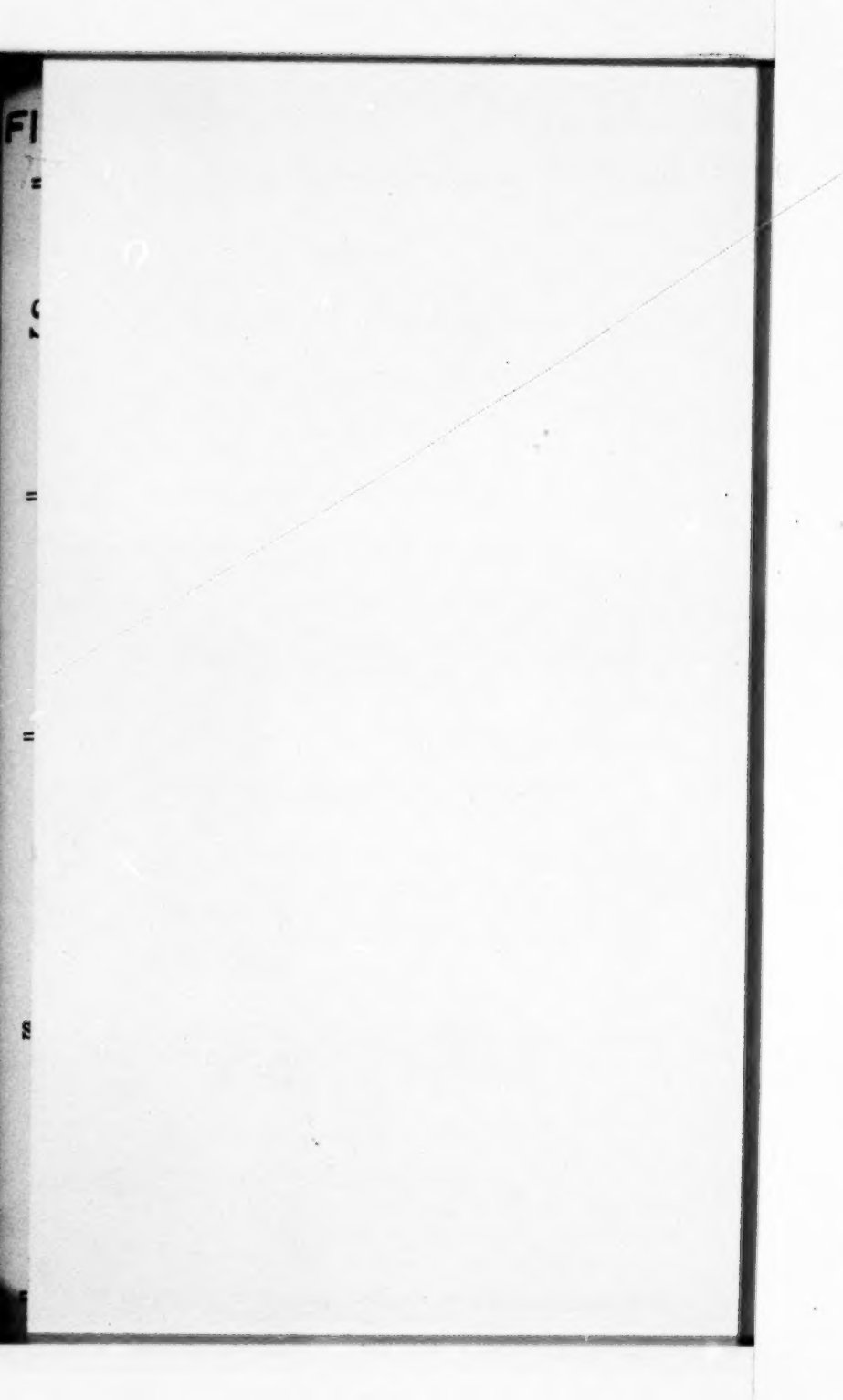
We respectfully submit, further, that under the well settled principles of law announced by this Court in the cases hereinabove cited, it is manifest that the statute complained of, as construed and applied to appellants by the court below, is obnoxious to the Fourteenth Amendment because it deprives them of their property without due process of law, and that it cannot be sustained upon the grounds assigned by the court below.

It follows, therefore, that the judgment below is erroneous and should be reversed.

Respectfully submitted,

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

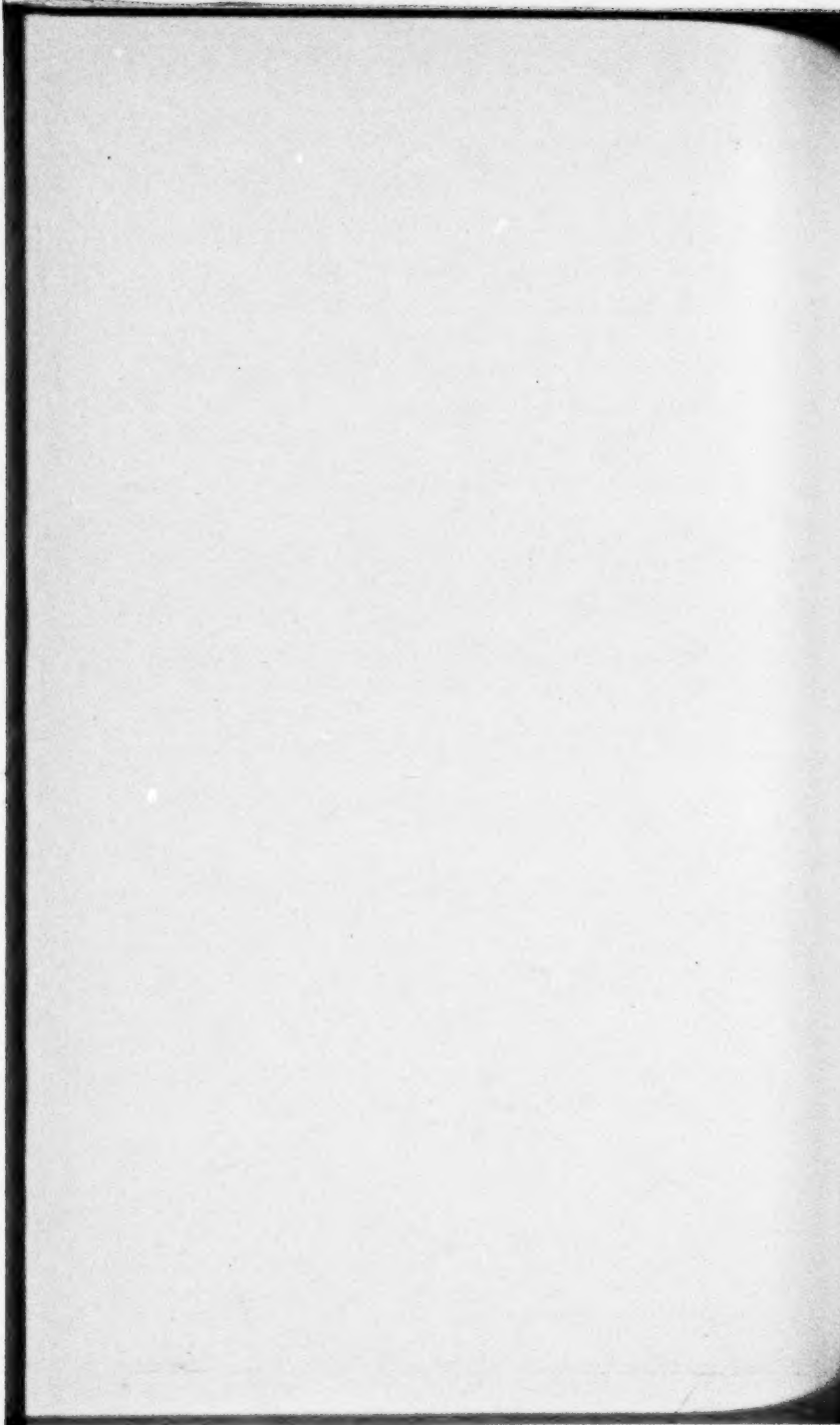
ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION OF CLAYTON F. SMITH, REGISTRAR OF TITLES OF COOK COUNTY, ILLINOIS, FOR LEAVE TO APPEAR AS AMICUS CURIAE, OR TO INTERVENE AS PARTY, AND TO DISMISS FOR WANT OF JURISDICTION.

STATEMENT OF MATTER AND GROUNDS MAKING AGAINST THE JURISDICTION ASSERTED BY APPELLANTS.

J. SCOTT MATTHEWS,
Counsel for Clayton F. Smith, Recorder of Deeds and ex officio Registrar of Titles of Cook County, Illinois.

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STATEMENT OF MATTER AND GROUNDS MAKING AGAINST THE JURISDICTION ASSERTED BY APPELLANTS.

MOTION.

And now comes Clayton F. Smith, Recorder of Deeds and *ex-officio* Registrar of Titles of Cook County, Illinois, by J. Scott Matthews, his attorney and counsel and moves the court.

(a) For leave to appear as *amicus curiae* in the above entitled cause, and to file statements and briefs as such, or

(b) In the event that said motion for leave to appear as *amicus curiae* is denied, for leave to enter his appearance as a party defendant in the above entitled cause, and

(c) In the event of the allowance of either motion to appear as *amicus curiae*, or as party defendant, the registrar of titles of Cook County, Illinois, moves that the appeal of appellants from the Supreme Court of the State of Illinois in the above entitled cause be dismissed at appellants' costs for want of jurisdiction.

In support of which motion the Registrar of Titles of Cook County, Illinois, presents the suggestions attached hereto and a statement of matter and grounds making against the jurisdiction asserted by appellants.

CLAYTON F. SMITH,
Recorder of Deeds and Ex-Officio Registrar of Titles of Cook County, Illinois.

By J. SCOTT MATTHEWS,
His Attorney and Counsel.

SUGGESTIONS IN SUPPORT OF MOTION.

1. This case arose on a supplemental petition filed in the Circuit Court of Cook County, Illinois, in an original land title registration proceeding under Sections 93 and 94 of "An Act Concerning land titles," in force May 1, 1897, in the State of Illinois, which act is commonly known as the Torrens Act. The purpose of the petition was to cancel two certificates of title issued by the Registrar of Titles of Cook County, Illinois, and two deeds filed with the Registrar of Titles. Charles Wilborn, Carrie S. Wilborn and Noel State Bank, appellees, were defendants to such petition, as was the then Registrar of Titles of Cook County, Illinois. Charles Wilborn, Carrie S. Wilborn and Noel State Bank filed demurrers to said petition which were sustained by the trial court and by the Supreme Court of Illinois on appeal. The Registrar of Titles of Cook County, Illinois, against whom the primary relief of cancelling the deeds and certificates of title was sought was never served with summons and is not a party to the proceeding.

2. On October 2, 1929, the following letter signed by the attorneys of record for appellees, Charles Wilborn, Carrie S. Wilborn and Noel State Bank, which bears date September 25, 1929, but was not delivered until October 2, 1929, was delivered personally at the office of the Registrar of Titles:

"Joseph G. Sheldon
Attorney at Law
Suite 1002-1004 Association Bldg.
1[illegible] South La Salle Street
Tel. Randolph 4861

Chicago, September 25, 1929.

Mr. Clayton F. Smith, Recorder of Deeds,
Registrar of Titles,
County Building, Chicago, Illinois.

My Dear Sir:

You have probably been advised by your attorney that at the June term 1929 of the Supreme Court an opinion was handed down in the case of *Eliason* v. *Wilborn,* which is of tremendous importance to the Torrens Office. The court held in that case that under the provisions of Section 42 of the Torrens Act a certificate issued on a forged deed conveys a good title where the premises, after the forged deed has been accepted by the Registrar and a new certificate issued, are conveyed to a purchaser for value without notice, who accepts them on the strength of the new certificate and has no knowledge or notice of the fraud committed, and that in such a case the only remedy of the original owner, whose name was forged and who has thus lost his property, is against the indemnity fund.

The unsuccessful appellants in that case have now perfected an appeal from that decision to the Supreme Court of the United States on the ground that this Section 42 of the Torrens Act, as construed by our Supreme Court in that case, is repugnant to the Fourteenth Amendment to the Constitution of the United States in that the appellants were deprived of their property without due process of law. In that appeal various documents have been served on us as attorneys for the appellees, Charles Wilborn, Carrie S. Wilborn and Noel State Bank.

We have discussed with our clients the question of the advisability of their following this appeal to the Supreme Court, and they have finally decided not to do so, but to permit the United States Supreme Court to wrestle with this question as best it can without the aid or assistance of any attorneys retained and compensated by them. The reason for this decision on their part is that to them the question of the constitutionality of this section of the Torrens Act is of no particular importance as a matter of dollars and cents. They have already spent and become obligated for considerable amounts of money in defending in the trial court and in our Supreme Court the litigation instituted by Eliason, and they do not desire to incur any further expense. If the United States Supreme Court reverses the decision of our Supreme Court and decides that Section 42 of the Torrens Act, as construed by our Supreme Court, with reference to a title derived under a forged deed, is null and void because it is repugnant to the Federal construction, our clients still have their right to a defense against the petition of the complainants on the facts. From what they tell me, it is very likely that upon such a hearing they will be successful in defeating the petition of the appellants, even though the United States Supreme Court should hold that our Supreme Court erred in its decision.

Furthermore, even though our clients should be unsuccessful upon a hearing on the facts of the appellants' petition, and the certificate issued to them be held invalid and ordered cancelled, there can be no question but that they would have a right to file a claim against the indemnity fund for the loss sustained by them in purchasing this property on the strength of the certificate which was later so declared invalid and void.

When you take all these matters into consideration, you will readily see that to them the question of the constitutionality of Section 42 of the Torrens Act is of no particular importance, in other words, nothing but an academic question, and there is no reason why they should spend any further money defending the appeal to the United States Supreme Court.

However, the question of the construction of that Section and the constitutionality of it is undoubtedly

a very important question to the people at large, and especially to those who own property registered under the Torrens Act. For that reason we have obtained our clients' consent to permit you, if you so desire, to engage your attorney either to represent our clients in the litigation in the United States Supreme Court, or if you prefer, to have him file a petition in that court for leave to appear as *amicus curiae* and file a brief and argument as such.

Naturally, this permission is given only on the condition that there will be no expense whatever to our clients connected with such appearance, either in the way of attorney's fees or printing bills, stenographer's fees, traveling or other expenses.

Trusting to hear from you at your earliest convenience in reply to this letter, we remain,

Yours very truly,

CHARLES F. GLAESER,
JOSEPH G. SHELDON."

From the foregoing letter, the original of which the Registrar of Titles is ready to produce in open court, it appears that Charles Wilborn, Carrie S. Wilborn and Noel State Bank, appellees, will not appear in the Supreme Court of the United States, and that unless the Registrar of Titles of Cook County, Illinois, is allowed to appear as *amicus curiae*, or to intervene as a party defendant, there will be no argument or brief on behalf of the appellees and only the appellants' side of this case will be presented to this honorable court.

Over 20 per cent of the property in Cook County, valued at more than one billion dollars, is registered under the Torrens system. The aggregate annual dealings in the Torrens office at Chicago are over two hundred and fifty millions of dollars. The importance of any case which involves the question as to whether an innocent purchaser for value can rely upon a Torrens certificate of title cannot be over-

estimated, and this honorable court is entitled to the fullest arguments in favor of the Torrens system when it is attacked in this court.

The Registrar of Titles of Cook County cannot undertake the defense of a private individual, or provide counsel for a private individual, because he has no funds available for that purpose. Although he is the primary defendant in this suit, he was not served. The reason why he did not appear in the Illinois courts in the suit was that the case went up on demurrer between private individuals, and the Registrar of Titles did not desire to have it appear even impliedly by demurrer, that the deed which was attacked is a forgery, since the Registrar of Titles believes that he can prove that the deed was genuine, although the means of obtaining it may have been an imposition upon the appellants by a third party. It is for the same reason that the Registrar of Titles prefers to ask permission to appear as *amicus curiae* in this court, rather than as a party defendant. But if this honorable court does not desire to have the Registrar of Titles appear as *amicus curiae,* then the Registrar of Titles respectfully asks that he may be allowed to appear as a party defendant, because he believes that it would be to the best interests of the multitude of holders of Torrens certificates in Chicago to have him admit the facts pleaded for the sake of argument and to have the Torrens side properly presented to this court, rather than not to have it presented at all.

The Registrar of Titles of Cook County, Illinois, therefore respectfully prays that he may be allowed to appear in this cause either as *amicus curiae,* or as a party defendant, as this honorable court may deem best.

The Registrar of Titles has also moved that this case be dismissed at appellants' costs for want of jurisdiction for the reasons set out in his statement of matter and grounds

making against the jurisdiction of this honorable court asserted by appellants. In view of the short time intervening before this honorable court meets and the motion is presented, the Registrar of Titles has confined himself strictly to the question of jurisdiction. If this honorable court should find that it has jurisdiction, then the Registrar of Titles of Cook County, Illinois, respectfully requests that he be given an opportunity to present a full and complete argument of this case from a Torrens standpoint.

Respectfully submitted,

CLAYTON F. SMITH,
Recorder of Deeds and ex-officio Registrar of Titles of Cook County, Illinois.

By J. SCOTT MATTHEWS,
His Attorney and Counsel.

STATEMENT OF MATTER AND GROUNDS MAKING AGAINST THE JURISDICTION OF THIS HONORABLE COURT ASSERTED BY APPELLANTS.

MAY IT PLEASE THE COURT:

The Registrar of Titles of Cook County, Illinois, herewith respectfully presents the following matter and grounds making against the jurisdiction of this honorable court in this case asserted by appellants:

A.

NATURE OF CASE AND RULING BELOW.

Section 110 of the Illinois Torrens Act (Chapter 30, Section 152, Cahill's Illinois Revised Statutes of 1929) provides:

> "The provisions of this act shall not apply to land in any county until this act shall have been adopted by a vote of the people of the county * * *."

The provisions of the act were *voluntarily* adopted by vote of the people of Cook County, Illinois, at the election in November, 1897.

Section 46 of the Illinois Torrens Act provides:

> "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

The land in question was *voluntarily* brought under the act by Edward J. Haley and Mary A. Haley, his wife, and the provisions of the act thereby *voluntarily* adopted.

By mesne conveyances the title was passed *voluntarily and under the terms of the act* to Edward Eliason and Elin Eliason, his wife, who thereby took subject to the agreement running with the land by virtue of the statute that the title should be subject to the terms of the act.

The purpose of the Illinois Torrens act is to allow an innocent purchaser for value to rely upon a certificate of title issued by the Registrar of Titles, and the appellants, Edward Eliason and Elin Eliason, by acquiring a certificate of title issued by the Registrar of Titles thereby held out to innocent purchasers for value of the property in question that they could rely upon the certificate of title for that property issued by the Registrar of Titles.

In the case of *In re Bickel*, 301 Ill. 484, 134 N. E. 76, the purpose of the Torrens system was stated as follows:

> "The general purpose of the Torrens system of registration of land titles has been variously stated by courts and other authorities to be, to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain by an inspection of the register who may convey to him the title; (*Glos* v. *Kingman & Co.*, 207 Ill. 26); to create an independent system of registration of land titles so that all instruments intended for the purpose of passing or affecting any title to real estate registered thereunder should be filed and registered in the office of the registrar and at no other place; (*Hacken* v. *Isenberg, supra*); to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested; (*Robinson* v. *Kerrigan*, 151 Cal. 40, 90 Pac. 129); to establish a method by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official, made by law conclusive in that regard; (3 Tiffany on Real Property,—2d ed.—2273;) and to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested.

(23 R. C. L. 273.) The basic principle of the system is the registration of the title to the land, instead of registering, as under the old system, the evidence of such title. (34 Cyc. 598.)"

Under any system of dealing with real estate titles, every transfer of land may be looked at from one of two standpoints, either from the standpoint of the party claiming to be the owner or the standpoint of the party dealing with the land. In the case of a sale, it may be looked at from the standpoint of the vendor or the vendee. Appellant's on Page 22 of their statement say:

> "It is a high ideal to establish a system of evidencing land titles which *at the time of acquiring title* shall protect a purchaser in expending his money. But it is a much higher ideal that such system shall protect an owner in the enjoyment of his property, *after it has been acquired.*"

The Supreme Court of Illinois has held in the following cases that it is the purpose of the Illinois Torrens act to protect the person dealing with the land and relying on the outstanding certificate of title:

In *re Bickel,* 301 Ill. 484, 134 N. E. 76; *Hacken* v. *Isenberg,* 288 Ill. 589, 124 N. E. 306; *Evans* v. *Chicago Title & Trust Co.,* 317 Ill. 11, 147 N. E. 412.

This has now become a settled rule of property in Illinois, and appellants would ask this honorable court to change that rule of property as laid down by the Supreme Court of Illinois and substitute another because appellants say that it is a much higher ideal.

Where the rule is one affecting title to real estate within the State and has been repeatedly determined by decisions of state courts so that it is established as the law of the State, there has been no departure from the rule that the federal courts will follow the decisions of the state courts. to avoid the uncertainty and injustice which result from

"the discordant element of a substantial right and which is protected in one set of courts and denied in the other, with no superior to decide which is right," the United States Supreme Court has not hesitated when there has been a conflict of decision between it and the state courts affecting a rule of property within the State, to overrule its own decisions once it has become evident that they have established a "rule of property" as the settled law of the State. *Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458, 69 L. Ed. 1050, 45 Sup. Ct. 543.

The Supreme Court of the United States has taken this position with reference to decisions of the Supreme Courts of Hawaii and the Philippine Islands in land title registration cases.

Lewers & Cooke v. *Atcherly,* 222 U. S. 285, 32 Sup. Ct. 94, 56 L. Ed. 202.

Gauzon v. *Compania General de Tabacos de Filipinas,* 245 U. S. 86, 62 L. Ed. 165, 38 Sup. Ct. Rep. 46, 42 Philippine Islands 985, 42 J. F. 1042.

Section 47 of the Illinois Torrens Act (Chapter 30, Section 95, Cahills' Illinois Revised Statutes of 1929) provides that on any transfer of title the owners' duplicate certificate of title must be produced.

In the petition filed in the Circuit Court of Cook County by appellants, to which demurrers were sustained, the statement is made that

> "your petitioners *entrusted to the said Napletone* a duplicate original of said contract of sale and also the Certificate No. 113893 evidencing the title of your petitioners in and to said premises."

In the statement as to jurisdiction on appeal (page 4) appellants have digested this portion of their petition as follows:

"In May, 1926, Napletone, a stranger to the title, *surreptitiously obtained* from appellants their certificate of title."

This Honorable Court is of course bound by the statement contained in the petition to which the demurrer was sustained that the owners' duplicate certificate of title was "entrusted" to Napletone by appellants, and not "surreptitiously obtained" from appellants by Napletone as set up in appellants' statement as to jurisdiction on appeal.

In other words, not only were appellants bound by the terms of the Torrens Act that an innocent purchaser for value could rely upon the outstanding certificate of title, but they actually "entrusted" the owners' duplicate certificate of title, without which a transfer could not be made, to Napletone, the party whom they claimed was guilty of a forgery of a deed.

The deed which is claimed to have been forged was filed for record in the office of the Registrar of Titles on May 19, 1926, as Document No. 303637. The owners' duplicate certificate of title No. 113893 which accompanied it, was admittedly genuine, and was the one "entrusted" by appellants to Napletone. The deed alleged to be forged ran to Jerome C. Napletone, the alleged forger. Napletone then received from the Registrar of Titles a certificate of title dated May 19, 1926, numbered 167919.

On May 29, 1926, there was filed in the office of the Registrar of Titles a deed from Jerome C. Napletone to Charles Wilborn and Carrie S. Wilborn, his wife, which was filed as Document No. 305058. It is not denied that said deed bore the genuine signature of Jerome C. Napletone. It was accompanied by said certificate No. 167919. The Registrar of Titles thereupon issued a certificate of title No. 175048 to Charles Wilborn and Carrie S. Wilborn, his wife, appellees herein. Charles Wilborn and Carrie S. Wilborn had no ac-

tual notice of the alleged forged deed. The certificate of title which they relied on was the genuine one numbered 167919 issued to Jerome C. Napletone. The deed which they relied on was a genuine deed from Jerome C. Napletone to themselves. If they could not rely on a genuine certificate of title and a genuine deed to themselves from the holder of that certificate of title, it means that the purpose of the Torrens Act as stated by the Supreme Court of Illinois cannot be carried out. Not only that, but it also means the purpose of the Illinois Torrens Act in requiring the production of the owners' duplicate certificate of title as a means of safety on any transfer of title means nothing, since an owner, if appellants' views of the law are correct, could "entrust" his owners' duplicate certificate of title to whom he pleased without fear of consequences.

In deciding this case (*Eliason* v. *Wilborn*, 335 Ill. 352, 167 N. E. 101), the Supreme Court of Illinois said:

> "The land in this case was first registered in the names of the Haleys and a certificate was issued to them. When appellants bought it they knew the title had been registered, and they took it subject to all of the rights, privileges and limitations of such registration and the law applicable thereto. They were under no obligations to buy, but when they did buy and registered their title they came under all of the provisions of the act and were presumed to know all of its terms. The title was registered in appellants under section 47, which provides that when a registered owner desires to sell his land he may transfer it by deed, and upon filing the deed in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferor has the title proposed to be transferred, he shall issue and register a new certificate in the name of the applicant. After the title was registered in appellants it could not be registered in Napletone until the duplicate certificate to appellants was surrendered to the registrar. If section 47 had been complied with it would have been impossible for Napletone to have ac-

complished this fraud. The act erected a safeguard against a forged transfer being registered, by the requirement that no transfer should be registered unless the owners' certificate was produced along with the instrument of transfer. Section 101 provides that any person wrongfully deprived of any land through the bringing of the same under the provisions of the act or by the registration of any other person as owner of such land, the person who is barred or who in any way is precluded from bringing an action for the recovery of such land shall have a right of action for damages against the county and may file a claim with the county board or bring an action at law for the recovery of such damages. In *Board of Education* v. *Blodgett*, 155 Ill. 441, it was held that the deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away."

The Registrar of Titles of Cook County respectfully represents that this decision of the Supreme Court of Illinois presents no federal question for the Supreme Court of the United States to review.

B.

Appellants bound by provisions of Torrens Act.

Appellants in their statement as to the jurisdiction of this court on appeal have raised the point that no validity or effect can be given to any consent or agreement of a person to surrender a right or privilege secured to him by the Constitution and laws of the United States, made or implied in obedience to a statute which imposes such consent or agreements as a condition to the exercise of a right or privilege granted by such statute. (Pages 9 and 10 of appellants' statement.) They cite cases involving state statutes imposing conditions on foreign corporations for the privilege of doing a local business and a California case in which the state required a private carrier to assume the

duties of a common carrier as the price for the privilege of using state highways.

It is useless to take up those cases in detail for they have no application to the present facts or the conditions under the Torrens law. In the removal cases and tax cases cited by appellants, a condition was annexed by state statutes to the privilege of doing a local business which involved the giving up by the foreign corporation of another right or privilege which the corporation had, thus placing them on terms of inequality with others engaged in the same local business. In the California case where a private carrier had to assume the duties of a common carrier as the price for using state highways, it was placed on an inequality with private carriers who did not use state highways. Of course the state would have no right in any of the cases cited to force inequality of rights on those who are in the same line of business.

Such cases have nothing to do with, and are not parallel with, the conditions under the Illinois Torrens Act. Under the Torrens Act every property owner in Cook County is on the same basis. He may or may not register the title to his property as he himself desires. The statute imposes no conditions. It is up to his own judgment. Every purchaser of Torrens property is on exactly the same basis. The statute imposes no conditions. He may purchase or not as he desires. In assuming the benefits or burdens of the Torrens Act, the person registering or purchasing assumes exactly the same benefits and burdens as every one else in like position. Everyone is treated alike. The statute makes no discrimination, and imposes no unequal conditions.

But a person accepting the benefits of the Torrens Act cannot pick out those which he deems satisfactory and disregard those which he deems unsatisfactory. To do that, or to be able to do that, would bring about that very in-

equality in like circumstances which were found in the removal, tax, and private carrier cases.

In this case appellants claim their own title under and by virtue of the Torrens Act. The provisions of the act are covenants running with the land which bind them. This very proceeding is a special one provided for by the Torrens Act only, and in which the Circuit Court of Cook County would not have jurisdiction unless the provisions of the act continuously bound the land in question. Yet appellants seek the benefits of the act which satisfy them, and to escape from the provisions of the act with which they are not satisfied.

A long line of cases hold that this cannot be done.

In *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 307, 73 L. Ed. 104, 106, decided January 2, 1929, by the Supreme Court of the United States, the court said:

> "It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. *Wall* v. *Parrot Silver & C. Co.,* 244 U. S. 407, 61 L. Ed. 1229, 37 Sup. Ct. Rep. 609; *Electric Co.* v. *Dow,* 166 U. S. 489, 41 L. Ed. 1088, 17 Sup. Ct. Rep. 645; *Eustis* v. *Bolles,* 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rep. 131; *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, 66 L. Ed. 206, 42 Sup. Ct. Rep. 83; *St. Louis Malleable Castings Co.* v. *George C. Prendergast Constr. Co.,* 260 U. S. 469, 67 L. Ed. 351, 43 Sup. Ct. Rep. 178. Upon like principle, we think that appellants, who have procured action by a state commission under a state statute, may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the state constituion. *Cf. Shepard* v. *Barron,* 194 U. S. 553, 48 L. Ed. 1115, 24 Sup. Ct. Rep. 737. The sound discretion which controls the exercise of the extraordinary powers of a federal

court of equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked."

In *St. Louis Malleable Casting Company* v. *George C. Prendergast Construction Company*, 260 U. S. 469, 67 L. Ed. 351, 43 Sup. Ct. Rep. 178, it was held that an owner of property within a special sewer district, who connected his premises with the sewer when constructed and availed himself of its benefits, is estopped from maintaining a suit in which, upon the ground that the manner of constituting the district and apportioning the cost infringed his rights under the Fourteenth Amendment, he seeks to cancel the tax bill issued to the contractor against his property.

In *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 66 L. Ed. 206, 42 Sup. Ct. Rep. 83, the Supreme Court of the United States said:

"Appellant sought a temporary injunction restraining the Virginia Commission of Fisheries from removing the stakes and marks which designated the boundaries of certain oyster grounds in the Rappahannock River, planted by him and which he claimed the right to occupy, and thereby opening the same for public use and enjoyment."

"He maintained that the Commission was proceeding under a state statute invalid because it failed to provide for proper notice and hearing and that the proposed action would deprive him of property without due process of law contrary to the Fourteenth Amendment."

"A majority of the three judges composing the court below concluded—264 Fed. 116—that the Commission had acted in substantial compliance with the challenged statute, that whatever rights or property appellant claimed in respect of the specified lands, or the oysters thereon, were necessarily based upon the statute itself and that he could not both assail it and rely upon it in the same proceeding. * * * We find no reason to interfere with this decree and it is affirmed."

In *Shepard* v. *Barron*, 194 U. S. 553, 48 L. Ed. 1115, 24 Sup. Ct. Rep. 737, the effect of a state statute as an implied contract by one taking advantage of the statute was adverted to by the Supreme Court of the United States. The court said:

"Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid and the expense thereof, which he ought to pay, transferred to a third person." • • •

"The plaintiffs have referred to *O'Brien* v. *Wheelock*, 184 U. S. 450, as the chief authority to support their contentions as to estoppel. In that case, while the estoppel contended for was denied, yet (at page 491) it is stated, in the opinion of the court, which was delivered by the Chief Justice, that: 'The result is not inconsistent with the cases that hold that, although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced.'"

"In the case at bar it is seen that the plaintiffs did in fact receive the full consideration for the contract. They obtained the improvement asked for, so far as the doing of the work was concerned, although the results arising therefrom were a great disappointment to them."

In *Wight* v. *Davidson,* 181 U. S. 371, 21 S. Ct. 616, 45 L. Ed. 900, the court said:

> "The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid."

In *Wall* v. *Parrot Silver & C. Co.,* 244 U. S. 407, 61 L. Ed. 1229, 37 Sup. Ct. Rep. 609, which involved a charge of fraud, the Supreme Court of the United States said:

> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other States and of a seemingly equitable character, for the reason that the appellants by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *Electric Co.* v. *Dow,* 166 U. S. 489; *Pierce* v. *Somerset Railway,* 171 U. S. 641; *Leonard* v. *Vicksburg, Shreveport & Pacific R. R. Co.,* 198 U. S. 416, 422. They cannot claim the benefit of statutes and afterwards successfully assert their invalidity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be."

In *Bartlett Trust Co.* v. *Elliott,* 30 Fed. (2nd) 700, the court said:

> "Even the provisions of the Constitution are not always available to the litigant. A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States. Provisions of a constitutional nature, intended for the protection of a property owner, may be waived by him when by a course of conduct it would be unjust to permit him to assert them."

In *Dunn* v. *Fort Rend County,* 17 Fed. (2nd) 329, the court, quoting from *Muscatine Lighting Co.* v. *Muscatine* (D. C.), 256 Fed. 933, said:

"A person may, by his acts or omission to act, waive a right which he may otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition."

In Cooley's Constitutional Limitations (8th Ed.), Volume 1, page 368, it is said:

"There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid if he whose property was taken assented thereto; and that he did assent and waive the constitutional privilege if he received the compensation awarded, or brought an action to recover it. So if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it all objection on the grounds of unconstitutionality is removed."

In *Haskell* v. *New Bedford*, 108 Mass. 208, the Supreme Judicial Court of Massachusetts said:

"The omission to make due compensation for private property or rights appropriated by authority of the legislature to the public use can be taken advantage of by the owner only, and, if he once assents to the taking, cannot afterwards be availed of by himself or those claiming under him."

In *Baker* v. *Braman*, 6 Hill (N. Y.) 47, it was held that a person may renounce a constitutional provision made for his own benefit. The Supreme Court of New York said:

"The case of *Taylor* v. *Porter* (4 Hill, 148) held the statute authorizing ane man to take the property of another for his own use, though under an appraisement of its value, to be void. The action was trespass *quare clausum fregit* by the owner; and a justification was pleaded without averring the plaintiff's consent. The decision proceeded on the ground that the land was taken *in invitum;* and Mr. Justice Bronson concedes in terms that the objection has no application where the owner consents. It was thrown out in the course of the argument of the present case, that such consent not being in writing, the title would still be void under the statute of frauds. The answer is that the owner's consent takes away all objection to the statute in relation to private roads. True, the road being an incorporeal hereditament, it could not be granted even at common law without a deed. But it was competent for the legislature to create an exception both to the common law rule and the statute of frauds. They have done so by the statute in question. In the light of the constitution, if not that of a law which lies at the foundation of all governments, this statute must be read with the proviso that the owner consent. That consent removes all obstacle and lets the statute in to operate the same as if it had in terms contained the condition. Clearly we may say of a statute as much as we do every day of deeds and other private acts, *valeat quantum valere potest.*"

"By bringing an action for the damages assessed, we have the clearest manifestation of consent; and an adoption of the machinery provided by the statute for effectuating the grant. The provision of the fundamental law was for the benefit of the owner only; and the maxim, *quilibet potest renunciare juri pro se introducto,* applies as well to constitutional law as to any other."

The case of *Baker* v. *Braman,* 6 Hill (N. Y.) 47, has been expressly approved by the New York Court of Appeals. In the case of *Embury* v. *Conner,* 3 N. Y. 511, the court held that a party may renounce a constitutional provision made for his benefit, and a law therefor which provides for the

transfer of property from one individual to another with the consent of the owner is not unconstitutional. The court said:

> "If the principles held in the case of *Baker* v. *Braman*, (6 Hill. 47), are sound—and I think that they are—they may be properly applied in this case. It was there held that the owner's consent took away all objection to the statute in relation to private roads; although the road was an incorporeal hereditament and could not therefore be granted even at common law without a deed, as it was competent for the legislature to create an exception both to the common law rule and the statute of frauds; and that the legislature had done so by the statute then in question. The action in that case was brought to recover the damages assessed by a jury, for a private road, which the commissioners of highways had laid out through the plaintiff's lands pursuant to 1 R. S. 517, Secs. 77, 78. It was there held that a person might renounce a constitutional provision made for his benefit, and that if a private road be laid out pursuant to the statute, with the consent of the owner of the land, the proceeding was valid, and that such consent need not be in writing; that a parol consent was sufficient; and that the bringing of an action after the road was so laid out and his damages had been assessed, was a sufficient manifestation of consent, and an adoption of the machinery provided by the statute for effectuating the grant. *Lee* v. *Tillotson* (24 Wend. 337), and *The People* v. *Murray* (5 Hill 472) are cases to show that a party may waive a constitutional as well as a statute provision made for his own benefit."

From the foregoing cases there can be no question that appellants in this case are in no position to challenge the validity or constitutionality of any of the provisions of the Torrens Act of Illinois complained of by them.

C.

No federal question involved.

Appellants have also sought to claim that the United States Supreme Court has the right to determine whether the acts or omissions to acts of appellants in fact constituted a waiver. (Appellants' statement, page 10.) That power has already been expressly denied by the Supreme Court of the United States.

In *Pierce* v. *Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316, 19 Sup. Ct. Rep. 64, the Supreme Court of the United States said:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one."

In *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rep. 131, the state court held that by accepting his dividend under the insolvency proceedings Eustis waived his legal right to claim that the discharge obtained under the subsequent laws impaired the obligation of a contract. The Supreme Court of the United States held that whether that view of the case was sound or not it was not a Federal question, and therefore not within the province of the Supreme Court of the United States to inquire about.

D.

Remedy against "indemnity fund."

Assurance or indemnity funds are usually provided in Torrens Acts for the purpose of indemnifying those who, relying upon the provisions of the Torrens Act, neverthe-

less suffer some loss or damage by reason of the operation of such act. Such funds are created and maintained through contributions of those who deal with the land registered under the Torrens system, and, when thus created cannot be regarded in the same light as funds raised by general taxation.

But even though assurance or indemnity funds under Torrens acts were created wholly through general taxation, it cannot be said that they are not raised and expended for public purposes. The Supreme Court of the United States has said that it is indisputable that the general welfare of society is involved in the security of titles to real estate and in the public registry of such titles.

> *American Land Co.* v. *Zeiss,* 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

It is obvious that the power to legislate as to such subjects inheres in the very nature of government. Assuming the right to regulate the transfer and devolution of real property; assuming the right of taxation over it, and making its protection a matter of daily concern, there is every reason why any state government should assure the holder of such title that it is good and in the event that loss or damage is sustained through defects therein should reimburse him for such loss or damage.

Such assurance of title does not amount to insurance of title. It has nothing to do with gambling with known defects in title. It is dealing only with the truth and assurance of truth. The citizens of any state are entitled to that much from their government.

In the case in which the first Ohio Act was held unconstitutional (*State* v. *Guilbert,* 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 A. S. R. 756), it was said:

> "Considering the purposes for which government is instituted and the high conception of individual right

which prevailed at the time of the adoption of the constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes. The legislature may, by law authorize the organization of corporations for the purpose of carrying on the business of insurance, but this grant of power is rather an implied negation of its authority to conduct such business itself."

This decision of the Supreme Court of Ohio has been often cited by other courts, but never followed, and a new Torrens Act was passed in Ohio which has since been upheld. In making such a holding, the Supreme Court of Ohio failed to differentiate between assurance of title which is nothing more or less than an assurance of the truth as to the title, and insurance of titles which means guaranteeing against loss or damage which may arise through defects in titles, even though the defects are known at the time that the title insurance policy is issued. Assurance as to the true state of the title is well within the power of the state as a matter of public concern. Insurance of bad or defective titles is a matter of private business with which Torrens Acts are not concerned.

In discussing the assurance or indemnity features of the Colorado Act, the Supreme Court of Colorado called attention to the fallacy of the assumption that the Torrens Act engages the state in the business of insuring titles.

White v. *Ainsworth*, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918 E. 179.

After setting forth the provisions of the act, the court said:

"We are unable to appreciate wherein these provisions make the state an insurer of title. The act pro-

vides a remedy for mistake committed by the governmental officers, and also against other parties; but in such instance it only agrees to pay upon the happening of any of the events mentioned in the sections, and then only out of a certain fund, which is created by a payment to registrar by each person registering title to land. It is not intended for the insurance of land titles nor as compensation for land taken without the owner's consent, but merely as a safeguard or protection, to that extent in favor of any one who might perchance be injured without other remedy by reason of the provisions of the act. It is quite probable, although unnecessary to determine, that the law could stand even though this indemnity feature were eliminated, and no provisions made for any such suit by claimants."

See also in this connection:

Jones v. *York County*, 26 Fed. (2nd) 623, (U. S. C. C. A. Neb.).

Shevlin-Mathieu Lumber Co. v. *Fogarty*, 130 Minn. 456, 153 N. W. 871.

Ashton-Jenkins v. *Bramel*, 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

In *People* v. *Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175, the Supreme Court of Illinois took the same view as the Supreme Court of Colorado and said:

"In our view of the case the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it."

The assurance or indemnity feature of the Illinois Torrens Act is in reality only an additional benefit created by that act of which appellants may avail themselves if the deed which they complain of was in fact a forgery. The Illinois Torrens Act could stand without an indemnity feature and the decision of the Supreme Court of Illinois be affirmed in view of the assumption of the provisions of the

act by appellants. The fact that an indemnity feature exists is a matter of benefit for appellants, if they have been really injured, and not a cause for attack upon the act.

The suggestion implied in the decision of the Supreme Court of Illinois in *Eliason* v. *Wilborn*, 335 Ill 352, 167 N. E. 101, that an indemnity fund is essential is at variance with its own decision in *People* v. *Simon, supra.* In either event, whether it is essential or not, it is there for the benefit of appellants and they became entitled to its benefit on assuming the provisions of the act by their purchase of the property in question.

CONCLUSION.

It is therefore respectfully submitted that if appellants have suffered any loss or damage, that loss or damage has occurred in consequence of their own acts; that no federal question is involved in this case; and that this appeal from the decision of the Supreme Court of Illinois should be dismissed at appellant's costs.

Respectfully submitted,

J. Scott Matthews,
Attorney and Counsel for Clayton F. Smith, Recorder of Deeds and Registrar of Titles of Cook County, Illinois.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION OF CLAYTON F. SMITH, REGISTRAR OF TITLES, OF COOK COUNTY, ILLINOIS, FOR LEAVE TO FILE BRIEF AND ARGUMENT ON THE MERITS OF THE CASE INSTANTER.

BRIEF AND ARGUMENT OF CLAYTON F. SMITH. REGISTRAR OF TITLES OF COOK COUNTY, ILLINOIS, ON MERITS OF CASE.

J. SCOTT MATTHEWS,
Counsel For Clayton F. Smith, Recorder of Deeds and ex-officio Registrar of Titles of Cook County, Illinois.

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IN THE

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No. 347.

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vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION OF CLAYTON F. SMITH, REGISTRAR OF TITLES OF COOK COUNTY, ILLINOIS, FOR LEAVE TO FILE BRIEF AND ARGUMENT ON THE MERITS OF THE CASE INSTANTER.

Motion.

Now comes Clayton F. Smith, Recorder of Deeds and *ex-officio* Registrar of Titles of Cook County, Illinois, by J. Scott Matthews, his attorney and counsel and moves the court for leave to file a brief and argument on the merits of the case as *amicus curiae* instanter; in support of which motion the Registrar of Titles of Cook County, Illinois, presents the suggestion attached hereto, together with said brief and argument.

CLAYTON F. SMITH,
Recorder of Deeds and Ex-Officio
Registrar of Titles of Cook County, Illinois.

By.....
His Attorney and Counsel.

Suggestions in Support of Motion.

1. There has been heretofore filed with this Honorable Court by the Registrar of Titles of Cook County, Illinois, a motion to dismiss for want of jurisdiction and a statement of matter and grounds making against jurisdiction asserted by appellants. The motion was taken by this Honorable Court and continued to the final hearing of this cause.

2. The Registrar of Titles of Cook County, Illinois, now presents the brief and argument attached hereto on the merits of the case as the official representative of the people of Cook County. The Registrar of Titles believes that in a matter so important to the people of Cook County, Illinois, the official representative of the people of Cook County should be permitted to present their view of the issues in this case in which the constitutionality of the vital parts of the Torrens Act are attacked.

Respectfully submitted,

CLAYTON F. SMITH.
Recorder of Deeds and Ex-Officio
Registrar of Titles of Cook County, Illinois.

By.....
His Attorney and Counsel.

STATEMENT OF CASE.

MAY IT PLEASE THE COURT:

This case is presumably brought for the purpose of determining whether a bona fide purchaser of real estate registered in Cook County, Illinois, under the provisions of "An Act concerning land titles," approved and in force in the State of Illinois May 1, 1897, commonly known as the Torrens Act, can rely upon a certificate of title issued by the Registrar of Titles of Cook County, Illinois, in accordance with the provisions of that act, or whether such bona fide purchaser must go back of said certificate of title and determine for himself if there has been any infirmity in the prior chain of title in the shape of a forged deed. Actually, as the question is presented to this Honorable Court, it is whether the Constitution of the United States, with the amendments thereto, is so inelastic that it will not admit of new methods in dealing with real estate titles in America, even with the consent of those so dealing.

In appellants' assignment of errors, it is claimed that Sections 40, 42 and 46 of the Torrens Act of Illinois are repugnant to the Fourteenth Amendment to the Constitution of the United States in that they deny the equal protection of the laws and take property without due process of law. (Trans. of Rec. p. 30.) The question of the Fourteenth Amendment appears to have been raised in this Court for the first time, since in the Courts below it appears (Trans. of Rec. p. 22) that it was the Fifth Amendment, and not the Fourteenth, which it was claimed to be violating. The Fifth Amendment applies only to Congress and not to the States. Nevertheless this brief and argu-

ment will be based upon the assumption that it was the Fourteenth Amendment which was brought in question.

Since the purpose of an Act is always a matter of inquiry when the Fourteenth Amendment to the Constitution of the United States is invoked in order to have the Act declared invalid, it is not only fitting but essential that a brief statement of the history and purpose of the Torrens Act of Illinois, and perhaps other Torrens Acts of other States and Territories of the United States, should be given.

"Torrens System" defined.

By "Torrens" systems generally are meant those systems of registration of transactions with interests in land whose "declared object * * * is, under governmental authority, to establish and certify to the ownership of an absolute and indefeasible title to realty, and to simplify its transfer. An important feature of the system is an indemnity fund to compensate any one who may be injured by the operation of the Act." (Hogg's Australian Torrens System, p. 1; Niblack's Analysis of the Torrens System, Sec. 8.)

The Torrens System of land title registration in the United States may be better defined as a system of the people, for the people, and by the people, of registering the title to land, with a guarantee by the people that the title as registered is correct.

It is perhaps unfortunate that this system of land title registration has become popularly known under the name of the man who was its originator in Australia, in that many people hearing of the "Torrens System" believe that it is some private system relating to real property, when in fact it is the people's own method of dealing with titles to real property.

Methods of dealing with land titles classified.

Although they may differ in detail, the methods of transferring title to, or dealing with, land throughout the United States may be divided into four general classes (*Cape Lookout Co.* v. *Gold,* 167 N. C. 63, 83 S. E. 3; Niblack's Analysis of the Torrens System, Sec. 2) as follows:

(1) Transfers or dealings without recording or registering; (2) Ministerial system of recording deeds or other written instruments; (3) Judicial system of registering titles; and (4) the Torrens System of land title registration.

"The first system is used in most of the counties in England, where land is transferred merely by the production and delivery of all the title deeds, including one from the seller to the purchaser. This is a substitute for the original common-law system of 'livery of seizin.' Under the law of primogeniture the eldest son inherits the real estate and the title papers go with the land. Until about fifty years ago land was scarcely considered a commercial commodity in England, and the rarity of its transfer made the above system less inconvenient than it would otherwise have been. Under that system the owner of land could borrow on the security of his land by merely depositing his title papers with the lender, who thus acquired an equitable lien on the land. This was popular with both borrowers and lenders, because it was cheap, safe and secret."

"The second system (of recording deeds) was the only one in use in this country before the adoption of the Torrens system, and prevails also in most of the countries of Europe, outside of England, and in South America and in Middlesex and York in England. In most of these countries, however, the conveyances are not recorded in full,

but merely a memorial, in a prescribed form, is copied on the records." (*Cape Lookout Co.* v. *Gold, supra.*)

The third or judicial system prevails to some extent in Russia, Turkey, Norway, Mexico, and some other countries. "In these countries conveyancing and dealings with land are done under judicial supervision, and are subject to entries made by courts. The modes of procedure and the effect of these entries differ in the different countries, but the underlying principle of the system is that title vests from the date of the instrument when it has been presented to the court and the proper entries concerning it have been made on the records of the court." (Niblack's Analysis of the Torrens System, Sec. 4.)

The fourth system is the Torrens system of land title registration. Its distinctive feature is that "it registers and determines the condition and ownership of the title to land, in lieu of registering instruments as evidence of title." (Niblack's Analysis of the Torrens System, Sec. 5.)

What the Torrens System is.

The Torrens System of land title registration is at one and the same time a system of conveyancing and a system of title assurance. The word "assurance" is used advisedly rather than the word "insurance." The word "assurance" has been defined to be "any instrument which confirms the title to an estate." It was anciently used to evidence and assure title to the grantor in a transfer of real estate previously made. (*State* v. *Rhodes,* 77 Kan. 202, 93 Pac. 610, 612.)

In discussing the assurance or indemnity features of the Colorado Torrens Act, the Supreme Court of Colorado in the case of *White* v. *Ainsworth,* 62 Colo. 513, 163 Pac. 959, Ann Cas. 1918-E-179, called attention to the fallacy of the

assumption that the Torrens Act engages the State in the business of insuring titles. After setting forth the provisions of the Act, the Court said:

> "We are unable to appreciate wherein these provisions make the state an insurer of title. The act provides a remedy for mistake committed by the governmental officers, and also against other parties; but in such instance it only agrees to pay upon the happening of any of the events mentioned in the sections, and then only out of a certain fund, which is created by a payment to registrar by each person registering title to land. It is not intended for the insurance of land titles nor as compensation for land taken without the owner's consent, but merely as a safeguard or protection, to that extent in favor of any one who might perchance be injured without other remedy by reason of the provisions of the act. It is quite probable, although unnecessary to determine, that the law could stand even though this indemnity feature were eliminated, and no provisions made for any such suit by claimants."

See also in this connection:

Jones v. *York County*, 26 Fed. (2d) 623 (U. S. C. C. A., Neb.).

Shevlin-Mathieu Lumber Co. v. *Fogarty*, 130 Minn. 456, 153 N. W. 871.

Ashton-Jenkins v. *Bramel*, 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

Methods of title assurance and title insurance in United States.

Strange as it may seem, a large proportion of the transfers of title of land in the United States are made without any real assurance that the title so transferred is good, or without any insurance against loss or damage resulting through defects in such title. This practice is largely due to ignorance of our recording and registry laws, and to

a large extent is indulged in by people who have emigrated from other countries.

Where some assurance is desired as to the title, the method most commonly used throughout the United States is to place reliance upon an abstract of title. Another method of guarding against loss by reason of defects in the title is by what is known as "title insurance" by title insurance companies. The third and last method of guarding against loss is the Torrens System of land title registration, which is primarily a system of title assurance and not insurance.

An abstract of title, properly prepared by a competent abstract maker and passed upon by a competent attorney, is a step far in advance of the older method of doing business by word of mouth or by laborious search through thousands of public records. Yet the fact remains that an abstract of title, even when prepared by the most skilled abstract maker and when passed upon by the most skilled attorney, cannot be relied upon as absolute evidence of title.

We need only apply a few tests in order to discover the accuracy of the statement. In the matter of forgery, delivery of deeds, identity of parties, sanity of parties, and occupancy and adverse possession, together with a number of other questions which might be mentioned an abstracter would have no notice of the rights of parties and an attorney examining the abstract would not be able to discover them from the abstract. And even though controverted matters may appear in the abstract, opinions of attorneys may differ as to their effect. So also abstracts of title, and copies of abstracts of title have proved but poor reeds to lean upon where assurance and evidence of title, and absolute protection are required.

Realizing the necessity of a better method of dealing with real estate titles, abstract companies themselves evolved

what is known as title insurance. Guarantee policies issued by such companies are a step in advance of abstracts of title in guaranteeing against loss or damage. But experience has shown that such guarantee policies can ordinarily only be issued subject to certain limitations, such as rights of adverse possession and matters not of public record. Nor do they wipe out defects in title. They merely guarantee over defects. Nor are they evidence of title in any suit at law or equity unless expressly made so by statute, while their guarantees are limited both as to amount and as to date.

With the trend of modern business life, a more efficacious method of dealing with land titles became necessary. As a matter of evolution the Torrens System of land title registration was bound to appear and did appear.

Origin of Torrens System.

The germ of the Torrens System may be said to have been planted in English jurisprudence by the publication of the Second Report of the Real Property Commissioners in 1830. This report, together with the reports of 1850 and 1857, contain valuable statements on many points of real property law and registration. The real birth of the system, however, occurred in 1858 in the enactment of two statutes by the South Australian Legislature at the instance of Sir Robert Torrens.

It is worthy of notice, in this connection, that Sir Robert was not a lawyer. He was a collector of customs, and very probably he worked out his system through analogy to the method by which the government furnished a certificate as evidence of one's ownership of a vessel. Manifestly his intent was to free land titles from the indictment of common sense, which is often framed in the impatient and seemingly unanswerable question: Why should there be

any greater uncertainty of ownership of land than of personalty, and why should land titles have to be searched through a "godless and profitless jungle?"

Since the system was introduced into South Australia in 1858, it has found more or less favor with people of English extraction. It seems that it yet has thorny paths to tread. Its author, as aptly said by the writer of the learned and interesting article on this system in 54 Central Law Journal 285, "little knew we may assume, the immeasurable distance which the common law had placed between rights of ownership of real estate and of personal property. He never dreamed that, out of the dead past, the ghostly hand of the 'unknown claimant,' the 'party entitled to notice,' 'the person under disability,' 'the absent defendant,' and other well known spooks clad in the dignity of judicial decisions of many generations, is held able to stretch out and fasten upon real property as distinguished from personalty." Nor, we may add, did he foresee the narrow path the system would have to tread through the many and various limitations of the American Constitution, before it could establish itself in the states of the American Union. Thus far, however, it is refreshing to know that the system has been adaptable enough to conform with American Constitutional government, and the attacks have only demonstrated its strength and worth.

Of the Torrens System as worked out by Sir Robert Torrens, it has been said:

> "The introduction of the system into South Australia was strongly opposed by lawyers of every class, from solicitors to judges, and no harder things have been said of the Torrens system generally than have been said of the South Australian Statutes in South Australia. It will probably be conceded that the English Act of 1862 was better drafted and more scientifically modeled in accordance with English real property law. Nevertheless in New Zealand the Land Reg-

istry Act of 1860, after a trial of ten years, and in Victoria and New South Wales Bills on the same lines, were all abandoned in favor of measures based on Sir Robert Torrens' Statutes, and the Australian system has been as successful in obtaining the approval of the public as the English system has been unsuccessful. One explanation, or a partial explanation of this, seems to be that the English Acts have, by that very adherence to the forms and principles of English land law and conveyancing in which Sir Robert Torrens' Act was strikingly deficient, failed to remedy the evils incidental to the existence of the equitable estate. The South Australian Statutes grappled with these evils—certainly rather from the point of view of a layman than a lawyer—with great boldness, and at the cost of neglecting the feudal rules which underlie real property law; but the result has been the nearest approach yet made in form to allodial ownership under purely English law." (Hogg's Australian Torrens System (1905), pages 21 and 22.)

Another author has given a more colorful description of the growth of the Torrens System as follows:

"It was adaptable and has proved capable of modifications suitable for the native folk-titles of Fiji or the medieval tenures of the Caroline-Anspach cities, for the equatorial ranches of Uganda as for the half-sections of the Canadian West. The nomads of the Algerian plains and the communal tribes of Papua, the shepherds of the Swiss mountain cantons, and the orange growers of California, alike came under the scheme, the essentials of which hold sway in the newest French Colony, in Styrian folk-law, and in American Corporation laws. It extends to 31 legislative units within the British Empire, to sixteen territories of the United States, to parts of Britain, and, in all essentials, to an area in Europe five times the size of England. It extends over the whole belt of French colonies on the Mediterranean, and at present, campaigns are being waged to extend it in America and to introduce it in France proper." (Roberts History of Australian Land Settlement, page 220.)

Historical Development of the Torrens System in the United States.

The earliest land title registration act in the United States was passed in Illinois in 1895, but was declared unconstitutional upon the ground that there was a delegation of judicial powers in violation of the Constitution of that State. (*People* v. *Chase,* 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105.) An Ohio Act of 1896 was held unconstitutional by the Supreme Court of that State, upon substantially the same ground, and upon the ground that the Act violated the due course of law guaranteed by the Ohio Bill of Rights, in that it provided for inadequate service, especially upon known adverse claimants residing in the State, and upon the further ground that it attempted to authorize the taking of private property for uses not public, without compensation. (*State* v. *Guilbert,* 56 Ohio St. 575, 47 N. E. 551, 60 A. S. R. 756, 38 L. R. A. 519.)

In 1897 the Legislature of Illinois passed another law designed to meet the constitutional tests fixed by the Supreme Court of Illinois, and that Act was sustained as constitutional. (*People* v. *Simon,* 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. R. 175.) So also in 1913, after an amendment to the Constitution of Ohio a registration Act was passed which was held not to be objectionable. (*Persinger* v. *Britton,* 29 O. C. A. 316, 10 App. 164.)

The States and Territories of the United States which have enacted land title registration Acts, with the date of the first enactment in the States or Territories, are as follows:

> Illinois (1897), California (1897), Massachusetts (1898), Minnesota (1901), Oregon (1901), Colorado (1903), Washington (1907), New York (1908), North Carolina (1913), Mississippi (1913), Ohio (1913), Ne-

braska (1915), Virginia (1916), South Carolina (1916), Georgia (1917), Utah (1917), Phillipine Islands (1902), and Hawaii (1903).

Object and Purpose of Torrens System.

In writing of the object and purpose of the Torrens System there has been a confusion in the minds of writers between purpose, method and effect. The purpose or object of a system of land title registration is the ideal which is kept before the mind as the particular thing to be attained. The method is the orderly procedure which is followed. The effect is the result or product of that orderly procedure.

It has been said that a desirable system of conveyancing and of dealing with land must possess four qualities; it must be simple, secure, rapid and cheap. To these an Australian writer has added two more features as the attributes of a perfect conveyancing system, namely, accuracy and suitability to circumstances. These six features of simplicity, security, rapidity, cheapness, accuracy and suitability to circumstances may well be considered as the object and purpose of the Torrens System.

Method of Original Registration.

The method used in the United States to further the object and purpose of the Torrens System as above set forth is a judicial proceeding. It is now clearly established by the great weight of authority that a land title registration proceeding is an action *in rem* and not *in personam*.

Carino v. *Philippine Islands*, 212 U. S. 449, 29 Sup. Ct. 334, 53 L. Ed. 594.

Robinson v. *Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

Cooper v. *Buxton*, 186 Cal. 330, 199 Pac. 6.

Rock Run Iron Co. v. *Miller*, 156 Ga. 136, 118 S. E. 670.

Tyler v. *Judges of Court of Registration,* 175 Mass. 71, 55 N. E. 812, 41 L. R. A. 433.

First Nat. Bank v. *Woburn,* 192 Mass. 220, 78 N. E. 307.

State v. *Westfall,* 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571.

Dewey v. *Kimball,* 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704.

Drake v. *Fraser,* 105 Neb. 162, 179 N. W. 393, 11 A. L. R. 766.

Stewart v. *Kellough,* 104 Ohio St. 347, 135 N. E. 608.

Ashton-Jenkins Co. v. *Bramel,* 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

Roxas v. *Enriques,* 29 Phil. Islands 31, 29 J. F. 31.

Grey Alba v. *De La Cruz,* 17 Phil. Islands 49, 17 J. F. 50.

An applicant for initial registration must establish title in himself as against the whole world before he can ask to have his title registered. The act authorizing registration is not a substitute for a bill in equity to remove a cloud from title and only authorizes initial registration of a title good against everyone.

Teninga v. *Glos,* 266 Ill. 94, 107 N. E. 125.

Waugh v. *Glos,* 246 Ill. 604, 92 N. E. 974.

Glos v. *Kingman & Co.,* 207 Ill. 26, 69 N. E. 632.

Glos v. *Cessna,* 207 Ill. 69, 69 N. E. 634.

Brooks v. *Glos,* 243 Ill. 392, 90 N. E. 751.

Glos v. *Wheeler,* 229 Ill. 272, 82 N. E. 234.

Glos v. *Holberg,* 220 Ill. 167, 77 N. E. 80.

In Illinois the fee simple title must be first registered. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 56.) The statute also contains adequate provisions for making all persons having or claiming any interest or estate in the land parties defendant. (Cahill's Ill. Rev. Statutes, 1929,

Ch. 30, Secs. 59, 66, 67, 68, 69, 70. See also *People* v. *Simon*, 176 Ill. 165, 52 N. E. 910, 68 A. S. R. 175, 44 L. R. A. 801; *Ambos* v. *Glos*, 314 Ill. 438, 145 N. E. 639.)

Where the statute is complied with, and the entire world are made defendants before proper tribunal or competent jurisdiction, it would necessarily follow that a decree entered in such a proceeding would be conclusive as against the world without any statutory statement to that effect. The statute in Illinois, however, attempts to give greater rights to adverse claimants and a longer time for asserting those rights than is given by any other American Torrens Act. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Secs. 74, 75, 76.) When the statutory time for asserting adverse claims is passed, an applicant has a title, the conclusiveness of which has been established in a thoroughly American manner by a court of competent jurisdiction by whom the rights of all parties have been properly adjudicated. In suitability to circumstances, therefore, it may be said that initial registration under the Torrens System is more thoroughly American and democratic, in giving everyone a square deal, than dealing with property titles by means of abstracts of title and guarantee policies where rights of innocent parties may be omitted from the one or guaranteed over by the other.

Method after registration.

The method used in American Torrens Acts after registration to further the object and purpose of simplicity, security, rapidity, cheapness, accuracy and suitability is:

(a) The creation and use of a certificate of title which sets forth in plain English the true condition of title to the extent required by law.

(b) The transfer of estates or interests only by registration upon the certificate of title.

(c) The creation of charges and liens only by notation as memorials upon the certificate of title.

(d) The protection of other rights or adverse claims by the registration of affidavits or caveats upon the certificate of title.

(e) A low schedule of fees and costs.

(f) The protection of innocent persons who are injured through the operation of the Statute by the creation of an indemnity fund.

Effect of methods used.

The effect of the methods used in original registration of title and after registration is:

(a) The creation within a state of a new and independent system of registration of title to property, the other and older system being the registration under the recording acts of the various instruments evidencing the title.

(b) The creation of one estate in land—the registered title.

(c) The creation of an indefeasible title, except as noted in the certificate of title, and to the extent allowed by law.

With a certificate of title which can thus be relied upon by any party dealing with the land, which certificate of title gives in plain English the names of the registered owner, and the estates, charges, and liens to which the title is subject, requiring no long search of a previous chain of title, and furnished for the ministerial cost of printing and typewriting the certificate, the object of simplicity, security, rapidity, cheapness, accuracy and suitability is thus obtained.

Facts of this case.

This case arises under a supplemental petition filed by Edward Eliason and Elin Eliason, his wife, in original land registration proceeding No. 11946 in the Circuit Court of Cook County, Illinois, under the provisions of Sections 93 and 94 of the Torrens Act. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Secs. 134 and 135.) In form it purports to be a petition to control the actions of the Registrar of Titles of Cook County, but the Registrar of Titles was never served. Demurrers of other defendants to the petition were sustained in the Circuit Court of Cook County and the action of the Circuit Court affirmed in the Supreme Court of Illinois.

The petition alleges that the premises in question were *"duly registered"* in the office of the Registrar of Titles in accordance with a decree of court on August 6th, A. D. 1921, in the names of Edward J. Haley and Mary A. Haley, his wife. (Trans. of Rec. p. 1.)

There is no averment in the petition of any infirmity in the original registration proceeding. The fact that the title to the premises was "duly registered" is equivalent to the statement that

(a) The title to the premises in question was regularly registered, with all judicial safeguards under a new and independent system of registration of title to property;

(b) That one estate in said premises had been created—the registered title;

(c) That an indefeasible title to said premises, except as noted in the certificate of title and to the extent allowed by law, had been created.

Since registration of title under the Illinois Torrens Act (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 55) is purely

voluntary (*Anderson* v. *Shepard,* 285 Ill. 544, 121 N. E. 215), the averment that the title to the premises was "duly registered" is also equivalent to an averment that it was *voluntarily* registered.

The averment that the title to the premises was "duly registered" also means

(a) That the applicants in such registration proceedings at the time of such proceedings paid into the indemnity fund created by the act one-tenth of one per cent of the value of the land (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 140), and thereby in common with all other applicants contributed to a common fund from which to pay loss or damage.

(b) That the applicants thereby entered into an agreement which shall run with the land "that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act." (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 94.)

If a separate and distinct consideration was needed in order to give validity to this agreement of the applicant on the creation of the statutory registered estate that the provisions of the act should be covenants running with the land, the payments of other owners into the indemnity fund would form sufficient consideration for such agreement just as the payments made by the applicants would be sufficient consideration for the agreements of owners of other registered property.

Such covenants running with the land would include the provision of the act making registration by the Registrar of Titles, and not delivery of a deed by the grantor, the essential element in a transfer of title. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 102.) Under the act a deed

"shall take effect only by way of contract between the parties thereto, and as authority to the Registrar to register the transfer * * * upon compliance with the terms of this act." This provision of the act does not say that a registration can only be had by deed of the registered owner. It merely limits the effect of such a deed when given. Other provisions of the act necessarily deal with transfers by the Registrar even against the will of the registered owner as in the case of foreclosure of liens, attachments, executions, etc.

Since there is no averment in the petition in this case to the contrary, it must also be assumed that a receipt of the petitioners for their certificate of title was on file with the Registrar of Titles; and that such receipt was *prima facie* evidence of the genuineness of such signatures. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 85.)

Although this proceeding is to control the action of the Registrar of Titles, there is no allegation of any fraud on the part of the Registrar or that he did not proceed strictly in accordance with provisions of the statute relating to transfers by deed.

It must therefore be assumed that the Registrar of Titles in this case before registration of the deeds complained of performed the duties required under the following words of Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 95:

> "And upon filing such deed or other instrument in the Registrar's office and surrendering to the Registrar the duplicate certificate of title, and upon its being made to appear to the Registrar that the transferor has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate. * * *."

In other words, there being no allegation to the contrary in the petition, it must be assumed that the Registrar of

Titles not only had the owner's duplicate certificate of title presented to him in this case, but that he also satisfied himself that the transferor had the right to have a transfer made by him and the transferee had the right to have the transfer made to him, and that the Registrar satisfied himself by comparison of signatures with the signatures on appellant's receipt, which signatures were prima facie genuine.

The allegations of facts as to the alleged forgery contained in the petition are briefly as follows:

Petitioners Edward Eliason and Elin Eliason, his wife, by mesne conveyances from the original applicants became the registered owners of the premises in question and had certificate No. 113893 issued to them on September 21, 1923, by the Registrar of Titles of Cook County. (Trans. of Rec. p. 1.)

On April 1, 1926, they entered into a contract of sale with George B. Kennedy and wife, (Trans. of Rec. p. 2), subject to a first mortgage of $2,700. (Trans. of Rec. p. 9.) The contract of sale does not appear to have been registered as required by the Torrens Act (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Secs. 107 and 108), but appears to have been in duplicate. The purchasers entered into possession of the premises, and the averment of payments made by them is that "up to the happening of the events hereinafter set forth" they made payments to petitioners. (Trans. of Rec. p. 2.) That the purchasers ceased to pay the petitioners and started to pay defendants is apparent from the prayer of the petition asking defendants "to account to your petitioners for any sum or sums paid to them by the purchasers under said contract." (Trans. of Rec. p. 6.)

In May, 1926, petitioners entered into negotiations with Jerome C. Napletone doing business as Bankers Discount

Co., for the sale to the said Napletone of said premises subject to the Kennedy contract and to the first mortgage of $2,700.

Petitioners expressly aver *"that in the course of the negotiations looking toward such sale, your petitioners entrusted to the said Napletone a duplicate original of said contract of sale and also the certificate No.* 113893 *evidencing the title of your petitioners in and to said premises."* (Trans. of Rec. p. 2.)

On May 19, 1926, Jerome C. Napletone deposited with the Registrar of Titles a warranty deed to said premises from petitioners to himself, together with the said certificate of title No. 113893, which was filed with the Registrar of Titles as Document No. 303637. On May 19, 1926, pursuant to said warranty deed the Registrar of Titles issued to Jerome C. Napletone a new certificate of title No. 167919 subject only to said $2,700 mortgage. It is alleged that the signatures of petitioners to said deed were forgeries and that the Notary Public who took the acknowledgment has stated to petitioners that he never saw them. (Trans. of Rec. p. 3.)

On May 29, 1926, there was filed in the office of the Registrar of Titles as Document No. 305058, a warranty deed from Jerome C. Napletone to Charles Wilborn and Carrie S. Wilborn, his wife, conveying said premises. It is not denied that the deed from Napletone to the Wilborns was genuine. On May 29, 1926, the Registrar of Titles issued certificate of title No. 175048 to said Charles Wilborn and Carrie S. Wilborn, his wife. (Trans. of Rec. p. 4.)

It is also averred that at the time of the execution and delivery of the warranty deed from Napletone to Wilborns, "the said Jerome C. Napletone also delivered to the said Wilborns the duplicate original" of the Kennedy contract, together with two purported and pretended assignments

of the vendor's interest in said contract, one purporting to be from the petitioners to Napletone (alleged to be a forgery) and one from Napletone to the Wilborns (not alleged to be a forgery). (Trans. of Rec. pp. 4 and 5.)

Although the duplicate original of the Kennedy contract of sale undoubtedly bore petitioners' genuine signatures, the alleged forger delivered it with the alleged forged assignment, and there are no allegations as to any difference in the signatures on the admittedly genuine contract and the alleged forged assignment delivered at the same time.

It is averred that between the recording of the two deeds and the issuance of the certificate of title to the Wilborns, the petitioners "protested" to the Registrar of Titles against issuing the certificate of title to the Wilborns. No proceeding in court by injunction or petition against the Registrar were filed, and it was not until after the Registrar had acted upon a genuine certificate of title and a genuine deed from Napletone to Wilborns that the petitioners brought this proceeding notwithstanding their prior knowledge. (Trans. of Rec. p. 4.)

The proceeding brought is a special one known only to the Torrens Act, and although petitioners claim that Sections 40, 42 and 46 of the Torrens Act relating to certificates of title are unconstitutional and void, and ask that certificates Nos. 167919 and 175048 be expunged and cancelled by reason of facts not shown upon such certificates, petitioners pray that in their own case the court may enter an order and decree finding title in petitioners.

> "*free and clear of all liens and encumbrances* except such as appear upon the certificate No. 113893, heretofore issued to your petitioners and subject only to said first mortgage for Twenty-seven Hundred ($2700) Dollars and the rights of the said George B. Kennedy and Pearl A. Kennedy, his wife, as purchas-

ers under said contract of sale and parties in possession." (Trans. of Rec. p. 6.)

In other words, although they protest against the Wilborns certificate being "free and clear" of liens, encumbrances and charges, except those noted thereon, they want the Registrar's actions confirmed as to themselves without further proof and to have their own certificate issued "free and clear" of everything except what they themselves specify, such certificate to be issued to them under sections of the Torrens Act which they claim are unconstitutional.

Resume of facts.

1. The Torrens Act of Illinois vests in the Registrar of Titles a reasonable discretion as to the facts surrounding a transfer.

2. It makes the receipt of each owner for his certificate of title prima facie evidence of the genuineness of such signature.

3. It requires the production of the owner's duplicate certificate of title before a transfer can be made.

4. It requires the Registrar of Titles to satisfy himself as to the rights of the transferor and transferee.

5. In Cook County it requires a bond of $200,000 of the Registrar of Titles to guard against any arbitrary action by him.

6. It allows recourse without fee on filing a petition to the Circuit Court to control any action of the Registrar of Titles which is wrongfully or negligently done, with appeal to the Supreme Court of Illinois.

7. In case of fraud, it allows any action of the Registrar of Titles to be set aside, providing the rights of persons

claiming under valuable consideration and in good faith have not intervened.

8. In case of loss in the latter event, it provides an indemnity fund for any injured party.

This is claimed by petitioners to deny them the equal protection of the laws and due process of law in a case where

1. The property was voluntarily registered under the Torrens law by petitioner's predecessors in title.

2. Where the provisions of the law are covenants running with the land.

3. Where no averments are made that the Registrar of Titles was guilty of any fraud.

4. Where it is not claimed that the Registrar of Titles did not have petitioners' genuine signature before him on their own receipt in accordance with the statute for his guidance.

5. Where the petitioners voluntarily gave up to the alleged forger their owner's certificate of title, without which no transfer could have been made.

6. Where the petitioners not only gave up their certificate of title, but also their own genuine duplicate original contract of sale to the alleged forger.

7. Where the petitioners voluntarily purchased registered property and made themselves subject to the law.

8. Where the petitioners, if there was in fact a forgery, have refused to take advantage of the indemnity fund which their predecessor in title helped to create.

9. Where the petitioners have taken advantage of the special provisions of the Torrens law allowing petitions to be filed against the Registrar of Titles to control his actions.

10. Where the petitioners have had a full hearing in the Circuit Court of Cook County and the Supreme Court of Illinois on their right of ownership to said property, and both courts have held against them.

On these facts it is respectfully submitted that the Torrens Act of Illinois affords full and equal protection to all parties similarly situated and due process of law both as to the acts of Registrar of Titles and the subsequent proceedings in the courts of Illinois.

BRIEF.

I.

The law of the state in which land is situated controls its alienation, transfer and descent. The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate.

Clark v. *Graham*, 6 Wheat. 577, 5 L. Ed. 334.

Kerr v. *Moon*, 9 Wheat. 565, 570, 6 L. Ed. 161.

McCormick v. *Sullivan*, 10 Wheat. 192, 202, 6 L. Ed. 300.

Taylor v. *Benham*, 5 How. 233, 273, 12 L. Ed. 130.

McGoon v. *Scales*, 9 Wall. 23, 19 L. Ed. 545.

Burbank v. *Conrad*, 96 U. S. 291, 298, 24 L. Ed. 731.

Brine v. *Insurance Co.*, 96 U. S. 627, 639, 24 L. Ed. 858.

Schley v. *Pullman Car Co.*, 7. S. Ct. 730, 120 U. S. 575, 580, 30 L. Ed. 789.

Langdon v. *Sherwood*, 8. S. Ct. 429, 124 U. S. 74, 81, 31 L. Ed. 344.

DeVaughn v. *Hutchinson*, 17 S. Ct. 461, 165 U. S. 566, 570, 41 L. Ed. 827.

Clarke v. *Clarke*, 20 S. Ct. 873, 178 U. S. 186, 191, 44 L. Ed. 1028.

Olmstead v. *Olmstead*, 30 S. Ct. 292, 216 U. S. 386, 393, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292.

Munday v. *Wisconsin Trust Co.*, 40 S. Ct. 365, 252 U. S. 499, 503, 64 L. Ed. 684.

People v. *Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

Arndt v. *Grigg*, 134 U. S. 316, 33 L. Ed. 918, 10 Sup. Ct. Rep. 557.

American Land Co. v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

II.

The states may classify the subjects of legislation and make different regulations as to the property of different individuals differently situated.

Barbier v. *Connolly*, 113 U. S. 27.

Field v. *Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

Chicago Dock Co. v. *Fraley*, 228 U. S. 680, 33 Sup. Ct. 715, 57 L. Ed. 1022.

Joslin Co. v. *Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1107.

Stebbins v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884.

White River Lumber Co. v. *Arkansas*, 279 U. S. 692, 49 Sup. Ct. Rep. 457, 73 L. Ed. 512.

III.

The Torrens Law of Illinois introduces a classification of property. The basis of this classification is not purely arbitrary. It arises out of the difference of the two systems of registration, the one being a registration of the various instruments affecting the title, the other of the registration of the title itself. This is a reasonable basis of distinction.

Evans v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

IV.

"The purpose of the Torrens Law was to provide a system of registration of land titles by which all instruments affecting the title should be filed and registered with one officer, who should be authorized to make a certificate of the title and show conclusively the state of the title and the person in whom it was vested, so that by a mere reference to the certificate the title to the land might be ascertained."

Kerr's Australian Lands Titles (Torrens) System, p. 165, Sections 310-314.

Gibbs v. *Messer* (1891), A. C. 248, 60 L. J. P. C. 20.

Kateneth Whakaruru et al. v. *The Public Trustee et. al.*, 12 New Zealand Law Reports 651.

Brown v. *Broughton*, 31 Western Law Reporter (Manitoba) 583.

Robinson v. *Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

Frances Inv. Co. v. *Superior Court in and for Imperial County*, 189 Cal. 107, 208 Pac. 105.

In re Seick, 46 Cal. App. 363, 189, Pac. 314.

Evans v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

Malaguti v. *Rosen*, 262 Mass. 555, 160 N. E. 532.

State ex rel. Douglas v. *Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

Henry v. *White*, 123 Minn. 182, 143 N. W. 324, L. R. A. 1916 D 4.

Baart v. *Martin*, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394.

Reed v. *Siddall*, 94 Minn. 216, 102 N. W. 453.

Shevlin-Mathieu Lumber Co. v. *Fogarty*, 130 Minn. 456, 153 N. W. 871.

Ashton-Jenkins Co. v. *Bramel*, 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

Brace v. *Superior Land Co.*, 65 Wash. 681, 118 Pac. 910.

McMullin & Co. v. *Croft*, 96 Wash. 275, 164 Pac. 930, reversing on rehearing 92 Wash. 411, 159 Pac. 375.

V.

Certainty against the unknown is the chief end of the Torrens System. Each Torrens Act should be liberally construed so as to effect that purpose.

Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 151.

Crowell v. *Akin*, 152 Ga. 126; 108 S. E. 791, 19 A. L. R. 51.

Tyler v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812.

American Land Co. v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

VI.

The act of registration by the Registrar of Titles is the operative act to convey or affect land.

Tyler v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812.

In re Juran, ... Minn. ...., 226 N. W. 201.

In re Abrahamson v. *Sundman*, 174 Minn. 22, 218 N. W. 246.

Dobek v. *Jennings* (1928), 1 D. L. R. 736.

VII.

The adoption of the Torrens Act in Illinois is voluntary by the voters of each county. In each county in which the act is adopted, the bringing of land under the act is left to the voluntary action of owners of real estate.

Evans v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

Eliason v. *Wilborn*, 335 Ill. 352, 167 N. E. 101.

VIII.

The effect of voluntary registration is not to provide a general waiver of constitutional guarantees for future transactions. The real effect is to transfer property from the class of non-registered property to the class of registered property, and to exchange the rights, privileges and liabilities of one class for the rights, privileges and liabilities of the other class.

Tyler v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812; writ of error denied, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252.

Eliason v. *Wilborn*, 335 Ill. 352, 167 N. E. 101.

Evans v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

Hooper v. *Haas*, 332 Ill. 561, 164 N. E. 23.

IX.

Equal protection of the laws under the Fourteenth Amendment does not guarantee equality of operation as between the great classes of property in Illinois—registered and non-registered. It guarantees equal protection within the class.

Stebbins v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884.

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 293, 18 Sup. Ct. Rep. 594, 42 L. Ed. 1037.

Williams v. *Walsh*, 222 U. S. 415, 32 Sup. Ct. Rep. 137, 56 L. Ed. 253.

Field v. *Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

Joslin Co. v. *Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1107.

X.

In order to violate the equal protection clause of the Fourteenth Amendment there must be an intentional violation of the essential principle of practical uniformity. Mere errors of judgment by officials will not support a claim of discrimination. No discrimination by the Registrar of Titles is charged in this case.

Sunday Lake Iron Co. v. *Wakefield*, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154.

XI.

The due process clause does not render our law incapable of progress or improvement.

Hurtado v. *California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232.

Sperry & Hutchinson Co. v. *Rhodes*, 220 U. S. 502, 31 Sup. Ct. 490, 55 L. Ed. 561.

XII.

"The provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

American Land Co. v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

XIII.

The discretionary powers of the Registrar of Titles are not obnoxious to the due process clause of the Fourteenth Amendment.

Dreyer v. *Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79.

XIV.

The Illinois Torrens Act provides adequate safeguards for all acts of the Registrar of Titles to prevent arbitrary action or discrimination.

(a) The certificate must contain identifying facts.

Torrens Act, Section 33 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 81.

(b) The handwriting of the owner is preserved for comparison.

Torrens Act, Section 37 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 85.

(c) An owner's duplicate certificate is delivered to the owner.

Torrens Act, Section 36, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 84.

(d) The owner's duplicate must be surrendered upon a transfer.

Torrens Act, Section 47, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 95.

(e) Proofs as to the rights of the transferer and transferee must be made to Registrar at the time of transfer.

Torrens Act, Section 47, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 95.

(f) The Registrar of Titles must file a $200,000 bond.

Torrens Act, Section 2, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 50.

(g) The Registrar is liable for neglect of himself or his deputies.

Torrens Act, Section 6, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 54.

(h) Petitions may be filed in the Circuit Court to set aside wrongful acts of the Registrar.

Torrens Act, Sections 93-94 (Cahill's Ill. Rev. St., 1929), Ch. 30, Secs. 134-135.

(i) Such petitions may be filed without any fee being paid therefor.

Torrens Act, Section 107 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 148.

(j) Damages, including reasonable attorney's fee, may be recovered from the indemnity fund for unauthorized acts of the Registrar.

Torrens Act, Section 96 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 137.

(k) Indemnity fund is created for the payment of damages.

Torrens Act, Section 102 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 143.

(l) A right of action for such damages is given against the county.

Torrens Act, Section 101 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 142.

(m) The right of filing an original bill or petition in equity in any court of competent jurisdiction is preserved.

Torrens Act, Section 94 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 135.

These provisions constitute due process of law.

XV.

Petitioners themselves in this case are directly responsible for any loss which may have occurred. Their acts operated as representations to third persons that the alleged forger had an assignable interest. When one person arms another with a symbol of property, he should be the sufferer, and not the person who gives credit to the operation and is misled by it.

Barry v. *Heider*, 19 Commonwealth Law Reports 197.

Great West Permanent Loan Co. v. *Friesen*, 4 D. L. R. (1924) 980.

XVI.

Assuming that the decision of the Supreme Court of Illinois that petitioners have been deprived of their property by their own acts was incorrect, since appellants have had a fair trial on that issue in the Circuit Court of Cook County and the Supreme Court of Illinois, they have not been deprived of their property without due process of law.

Bonner v. *Gorman*, 213 U. S. 86, 29 Sup. Ct. 483, 53 L. Ed. 709.

Tracy v. *Ginzberg*, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755.

Davidson v. *New Orleans*, 96 U. S. 97.

Central Land Company v. *Laidley*, 159 U. S. 103.

Backus v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575.

XVII.

The defendants in this case are not basing their rights on a certificate of title issued on a forged deed. They are basing their claim on a certificate of title issued on a genuine deed signed, sealed, acknowledged and delivered by the holder of a genuine certificate of title. Even though the prior certificate of title was based on a forged deed, it may act as a good root of title in the case of a bona fide purchaser.

Brown v. *Broughton*, 31 Western Law Reporter (Manitoba) 583.

Gibbs v. *Messer* (1891) A. C. 248.

Kateneth Whakaruru et al. v. *The Public Trustee et al.*, 12 New Zealand Law Reports, 651.

XVIII.

Appellants are bound by the provisions of the Torrens Act.

Cooley's Constitutional Limitations (8th Ed.), Volume 1, page 368.

12 C. J. 769, Sec. 190, 191.

United Fuel Gas Co. v. *Railroad Commission,* 278 U. S. 300, 307, 73 L. Ed. 104, 106.

St. Louis Malleable Casting Company v. *George C. Prendergast Construction Company,* 260 U. S. 469, 67 L. Ed. 351, 43 Sup. Ct. Rep. 178.

Hurley v. *Commission of Fisheries,* 257 U. S. 223, 66 L. Ed. 206, 42 Sup. Ct. Rep. 83.

Shepard v. *Barron,* 194 U. S. 553, 48 L. Ed. 1115, 24 Sup. Ct. Rep. 737.

Wight v. *Davidson,* 181 U. S. 371, 21 S. Ct. 616, 45 L. Ed. 900.

Wall v. *Parrott Silver & Co.,* 244 U. S. 407, 61 L. Ed. 1229, 37 Sup. Ct. Rep. 609.

Bartlett Trust Co. v. *Elliott,* 30 Fed. (2nd) 700.

Baker v. *Braman,* 6 Hill (N. Y.) 47.

Taylor v. *Porter* (4 Hill, 148).

Rusch v. *John Duncan Co.,* 211 U. S. 526, 43 L. Ed. 312, 29 Sup. Ct. Rep. 172.

XIX.

Appellants' remedy is against the indemnity fund.

White v. *Ainsworth,* 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918 E. 179.

Jones v. *York County,* 26 Fed. (2nd) 623, (U. S. C. C. A. Neb.).

Shevlin-Mathieu Lumber Co. v. *Fogarty,* 130 Minn. 456, 153 N. W. 871.

Ashton-Jenkins v. *Bramel,* 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

ARGUMENT.

I.

Law of state controls.

In discussing the question whether any section of the Torrens Act of Illinois violates any provision of the Federal Constitution, we must start with the assumption that the act is valid unless its provisions are so arbitrary and unreasonable that they run counter to some inhibition found in the Federal Constitution. In this case it is claimed by the appellants that certain provisions of the Torrens Act of the State of Illinois violate the provisions of the Fourteenth Amendment to the Constitution of the United States. The Torrens Act of Illinois is entitled, "An Act concerning land titles," something which has always been held to be peculiarly a matter of state concern only.

In *Arndt* v. *Grigg*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. Ed. 918, the Supreme Court of the United States said:

> "The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts. In *United States* v. *Fox*, 94 U. S. 315, 320, it was said: 'The power of the State to regulate the tenure of real property

within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

Many other decisions of the Supreme Court of the United States might be cited to the same effect, and a number of cases along the same line are cited in point I of this brief.

The same holding was made by the Supreme Court of Illinois in the very first case in which a Torrens Act was held constitutional in the United States.

People v. *Simon,* 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

In that case the Supreme Court of Illinois said:

"It is further insisted, that by proceedings subsequent to the initial registration an owner may be deprived of his property without due process of law. In the consideration of this point it must be remembered that the right to alienate or inherit property is always dependent upon the law. So long as vested rights are not disturbed the law may at any time change the tenure upon which land is held, and may alter the conditions under which it may be alienated and modify the rules of evidence by which the title is to be determined. The true theory of this act, as we understand it, is, that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that *thereafter the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules now prescribed.* 'A State may, by statute, prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens by descent, devise or alienation.' (3 Washburn on Real Prop., 4th ed., p.

187.) 'The right of ownership which an individual may acquire must therefore, in theory, at least, be held to be derived from the State, and the State has the right and power to stipulate the conditions and terms upon which the land may be held by individuals.' (Tiedeman on Real Prop., 2d ed., sec. 19.) 'The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.' (*Arndt* v. *Grigg*, 134 U. S. 316, on p. 321.) 'The power of the legislature in this respect, [as to changing the rules of evidence as to the burden of proof,] whether affecting proof of existing rights or as applicable to rights subsequently acquired or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, is practically unrestricted.'"

Gage v. *Caraher*, 125 Ill. 447, on p. 455:

"It being true that the law may prescribe rules of property and rules of evidence by which the title is to be shown, we see no reason why the transfer of real estate may not be made in the way contemplated, and why it may not be made compulsory to make it in that way, if the legislature so determines."

People v. *Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

In *American Land Co.* v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82, the Supreme Court of the United States said:

"As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government."

II.

State Has Power of Classification.

In *Barbier* v. *Connolly*, 113 U. S. 27, the Supreme Court of the United States said:

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for

these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, *but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.*"

The foregoing words were again quoted with approval in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685.

See also:

White River Lumber Co. v. *Arkansas*, 279 U. S. 692, 49 Sup. Ct. Rep. 457, 73 L. Ed. 512.

Stebbins v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884.

Joslin Co. v. *Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1107.

Chicago Dock Co. v. *Fraley*, 228 U. S. 680, 33 Sup. Ct. 715, 57 L. Ed. 1022.

Field v. *Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

III.

Torrens System introduces classification of property within state.

With the introduction of the Torrens system in any state there necessarily is a division at once of all the land in the State into two classes. The first class consists of all real property, the title to which is registered under the provi-

sions of the Torrens act. The second class consists of all real property, the title to which is not registered under the Torrens act. *Evans* v. *Chicago Title & Trust Co.*, 317 Ill. 11, 147 N. E. 412. Such a classification necessarily arises from the presumed intention of the legislature, but it is now also found in statutory provisions other than the Torrens act itself.

See:

Chapter 109, Cahill's Ill. Rev. Stat. (1929), Plats, Secs. 2, 9.

Chapter 82, Cahill's Ill. Rev. Stat. (1929), Mechanic's Liens, Sec. 24.

Chapter 77, Cahill's Ill. Rev. Stat. (1929), Judgments, Sec. 1.

Chapter 41, Cahill's Ill. Rev. Stat. (1929), Dower, Sec. 10.

Chapter 38, Cahill's Ill. Rev. Stat. (1929), Criminal Bail, Sec. 640.

Chapter 37, Cahill's Ill. Rev. Stat. (1929), Courts, Sec. 456.

Chapter 32, Cahill's Ill. Rev. Stat. (1929), Trust Co. Deposits, Sec. 351.

Chapter 30, Cahill's Ill. Rev. Stat. (1929), Certification of Abstracts, Secs. 154, 157.

In the judgment act of Illinois (Cahill's Illinois Revised Statutes, 1929, Ch. 77), Section 1 provides:

> "With respect to the creation of liens on real estate by judgments of courts of record, all real estate in the State of Illinois shall be and is hereby divided into two classes.
>
> The first class shall consist of all real property, the title to which is registered under the provisions of 'An Act concerning land titles,' approved May 1, 1897, as subsequently amended.
>
> The second class shall consist of all real property not registered under the provisions of 'An Act concerning land titles,' approved May 1, 1897, as subsequently amended."

This classification of all property in the State of Illinois in the two classes—registered and non-registered property— has been held constitutional by the Supreme Court of Illinois.

In *Evans* v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412, the Supreme Court of Illinois said:

> "The Torrens Law * * * simply introduces a classification of property. The law is a general law which the legislature had power to pass and does not interfere with the uniform enforcement of the process of all courts of record in the State. So far as land which has not been registered under the Torrens law is concerned, the judgments of all circuit courts in the State are liens upon all lands in the county not registered under the Torrens law. All may be made liens on land registered under the Torrens law by the same process of filing a certified copy of the judgment or a certificate of the clerk of the court in which it was rendered, stating its date and purport. The proceeding is the same whether the judgment is rendered in Cook County or any other county in the State. The appellee's only objection to this is that the Torrens law is not effective in any other county in the State than Cook and that the difference of the manner in which the title is evidenced is not a rational basis for classification with reference to the process of executing judgment. It is clear from what has been said that the classification of property for the purpose of subjecting it to the execution of judgment is justified. Since the tenure of land, the conditions of its alienation and the modes of its acquisition and transfer may be regulated by the legislature, it was a legislative question as to whether the change in the law evidenced by the Torrens law should be made. It was made by a valid law, and the legislature in the exercise of its power decided that the new system concerning land titles required a different process for executing judgments from that prevailing under the old system. The clearly indicated intention of the legislature was to provide that the registrar's certificate of title should be conclusive evidence of the holder's title, and that for this purpose no judgment should affect registered land until a certificate or certi-

fied copy of the judgment should be filed in the office of the registrar and a memorial entered upon the register of the last certificate of title to be affected. The basis of this classification is not purely arbitrary. It arises out of the difference of the two systems of registration, the one being a registration of the various instruments affecting the title, the other of the registration of the title itself. The difference in the manner in which the title is held may not be as great as the difference between personal property and real property, but we cannot say it was not sufficient to justify the legislature in accepting it as a basis for requiring different proceedings to establish the lien. If classification was proper the legislature had authority to determine upon what differences the distinction might be made between objects having some resemblance, and it is only where it is palpable that the power has been arbitrarily exercised that the courts can interfere. In our judgment the distinction between registered land and unregistered land is a reasonable basis of distinction, and the sections in question do not violate section 29 of article 6 of the constitution."

IV.

Purpose of Torrens System.

Since the Torrens system of land title registration originated in Australia and from thence spread through the British Colonies, and our Torrens acts are modeled on the Australian, English, New Zealand and Canadian acts, it is obvious that the construction of those acts and the statement of their purposes by their courts would, under well known rules of law, be binding upon the construction of American Torrens Acts unless there is some special provision contrary thereto either in the State or Federal Constitutions.

In the very latest work on the Australian Torrens System (Kerr's Australian Lands Titles (Torrens) System, p. 165, Sections 310-314), it is said:

"One of the cardinal objectives of the Torrens System is to facilitate the proof of title to estates in land. It was of the very essence of the scheme designed by Torrens that henceforward the mere presence of the document of title in the Register Book should prove such title to all the world and against all the world. Therefore, every bona fide purchaser without notice can rely absolutely on the title appearing in the Register Book, and, on becoming registered in respect of such title, cannot be defeated in his purchase, notwithstanding whatsoever flaws there may have been in the title of his vendor. In Australia, New Zealand, those Provinces of Canada, and other places that have adopted the Torrens System, the saying of Lord St. Leonards no longer holds true: 'No one's misfortune is so much slighted by the courts as his who buys a thing in the realty and does not look into the title.' Where the Torrens System prevails the buyer of realty without notice of any outstanding rights in third persons need not look into the title at all beyond what the Register Book shows to him and all the world. It is incumbent, however, on such buyer of realty to satisfy himself as to the identity and capacity of his seller. It is, after all, but a rule of common sense that if 'A' proposes to buy land of which 'B' appears in the Register Book to be the registered proprietor, 'A' must satisfy himself that he is dealing with 'B,' and not with 'Z' a forger; although, if perchance, 'B' neglects this precaution, and becomes registered, then 'C,' notwithstanding the forgery, can acquire from 'B' an indefeasible title, if 'C' purchases and becomes registered in good faith and ignorance of the facts."

"This indefeasibility of title is achieved by a series of provisions in the respective Torrens Statutes":

(a) "Judicial notice is to be taken of instruments and entries purporting to be authenticated by the Lands Titles Office."

(b) "The person named in or appearing by any certificate or other registered instrument as taking any estate or interest in land is declared to be the registered proprietor thereof."

(c) "The title of such registered proprietor is further declared to be indefeasible (except in case

of fraud), subject to the qualifications noted on such title, and to certain specified statutory qualifications, and this notwithstanding either the existence in the Crown or other person of any estate or interest, which but for the Torrens Statute might have been held to be paramount, or any irregularity in any application or proceedings."

(d) "(Subject to the exception of the case of fraud and the last-mentioned qualifications) every certificate issued by the Registrar is conclusive evidence that the person named in such certificate is entitled to the estate or interest specified therein."

(e) "Every such certificate is likewise conclusive evidence that the estate or interest so specified therein is under the provisions of the Torrens System."

(f) "No registered transferee, mortgagee, encumbrancee, or lessee acquiring bona fide for value is to be exposed to an action of any sort on the ground that the proprietor, through or under whom he claims, or any previous proprietor, has been registered through fraud or error of any description."

"The relationship of these provisions to the general scheme of the Torrens Statute is thus explained in *Gibbs* v. *Messer*, (1891) A. C. 248, 60 L. J. P. C. 20.

"The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. * * * The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right

from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration. * * * Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed."

To the same effect *Brown* v. *Broughton*, (1915) 8 W. W. R. 889, 31 W. L. R. 583, 25 Man. R. 489. (Holding that a bona fide purchaser dealing with a registered owner takes good title, notwithstanding the registered owner obtained his certificate by a forged deed.)

To the same effect *Fialkouski* v. *Fialkouski*, (1911) 1 W. W. R. 216, 19 W. L. R. 644, 4 Alta. L. R. 10.

The general purpose of the American Torrens Acts may be gleaned from the following American decisions:

"The object of the act," said the Supreme Court of California in holding the California Torrens Act constitutional, "is well stated in the title. It purports to establish a system for the registration of title to land, whereby the official certificate will always show the state of the title and the person in whom it is vested, and to provide that, after the original registration, transfers of the land may be made in the manner prescribed in detail in the act. As a foundation for the system it is necessary to have the title established. To that end a proceeding is authorized whereby such title may be settled and declared by a decree of the superior court. The title, thus established, is to be certified by the county recorder, and the certificate is made conclu-

sive evidence of title in the person therein named as the owner." (*Robinson* v. *Kerrigan*, 151 Cal. 40, 80, Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.)

"An act framed pursuant to such a purpose," the court again said in speaking of the benefit derived by the owner of land registered under the Torrens Act, "would lead to the issuance of a certificate of title worth having, one which would vouch to the world that the holder was the owner of the land described in it, that a merchantable title was vested in him. A statute framed without such an end in view would be of but scant value. It is to be remembered that the law, according to its title, is not purposed merely for the certification of land titles. It is also designed to provide for the simplification of the transfer of real estate and no considerable simplification results in such transfers if after obtaining a decree of the superior court that he has title to property and obtaining a certificate to that effect, one who has resorted to the procedure sanctioned by the law is compelled afterward to contend for additional decrees to secure to him a title which a buyer would accept on the market." (*Frances Inv. Co.* v. *Superior Court in and for Imperial County*, 189 Cal. 107, 208 Pac. 105.)

The California District Courts of Appeal have followed the Supreme Court of California in their decisions. In one case it was said that the act provided a complete scheme of procedure whereby, through a decree of the court, land may be brought under the operation of the act. "So that an intending purchaser, lessee, or mortgagee, or other person having dealings with the property, may go to the registrar's office, examine the leaf whereon the title to that property is registered, and at once, with safety, take a deed, lease, or mortgage from the owner of the property, file it, and have himself accordingly registered upon the leaf or folium

as owner, lessee, or mortgagee." (*In re Seick*, 46 Cal. App. 363, 189, Pac. 314.)

In *Evans* v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412, the Supreme Court of Illinois said:

> "The purpose of the Torrens law was to provide a system of registration of land titles by which all instruments affecting the title should be filed and registered with one officer, who should be authorized to make a certificate of the title and show conclusively the state of the title and the person in whom it was vested, so that by a mere reference to the certificate the title to the land might be ascertained. A previous act of the legislature intended to accomplish the same purpose, passed in 1895, was held unconstitutional on the ground that it conferred judicial powers upon the registrar of titles. (*People* v. *Chase*, 165 Ill. 527.) The act here in question was attacked for the same reason and others, but it was held not subject to the objections made to it and to be a constitutional exercise of legislative power. (*People* v. *Simon*, 176 Ill. 165.) It was there held that so long as vested rights are not disturbed the legislature has the power to regulate the tenure of land within the limits of the State, the conditions under which it may be alienated, the modes of its acquisition and transfer, and the rules of evidence by which the title is to be determined. 'The true theory of this act,' it was said, 'as we understand it, is, that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules now prescribed.' It was held that there was no reason why the transfer of real estate might not be made in the way provided by the act or why the legislature might not have chosen to make that way compulsory. It was not made compulsory, however, but it was left to the voluntary action of owners of real estate whether their lands might be brought under the act, and it was left to the action of the voters of each county whether the act should be effective in the county. The act was adopted in Cook County and

has ever since been in force in that county and a large amount of real estate has been registered under the act, but it has never been adopted, and is therefore not in force, in any other county."

The Supreme Court of the State of Massachusetts has succinctly said:

"Proceedings in the land court are judicial in nature. * * * The purpose of registration law is to bind the land and to quiet title to it. Registration is conclusive upon everyone, with a few exceptions not material to the issues in this case, and the rights of innocent purchasers for value are given special protection." (*Malaguti* v. *Rosen*, 262 Mass. 555, 160 N. E. 532.)

In an early leading case, the Supreme Court of Minnesota said:

"The basic principle of this system is the registration of the title of land, instead of registering, as the old system requires, the evidence of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered, and a certificate thereof delivered to him. In the other the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered. Necessarily the initial registration of the title—that is, the conclusive establishment of a starting point binding upon all the world—must rest upon judicial proceedings." (*State ex rel. Douglas* v. *Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297; *Henry* v. *White*, 123 Minn. 182, 143 N. W. 324, L. R. A. 1916 D 4.)

In another case the court said:

"We think the purpose of the statute was to create an indefeasible title in the person adjudged to be the owner, and who thus becomes the original registered proprietor. In the absence of fraud, the decree is final, unless reversed or modified as authorized by the statute. The instruments produced at the hearing to establish the applicant's title are evidence upon which the court is required to act, and its conclusion, as embodied

in the decree, is conclusive." (*Baart* v. *Martin,* 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394.)

The first opinion above cited was later commented on as follows:

"In the opinion of the Chief Justice in that decision will be found an accurate statement of the purpose of the law, as well as a summary of the essential processes through which the legislature sought to attain in the transfer of lands a more reliable certainty and confidence than had previously been known, so that a purchaser of real estate could be assured by the last registered transfer that the title was in the apparent record owner. This is to be accomplished by providing that the proceedings shall be conducted under the authority of a court having jurisdiction of the subject matter, instituted upon the voluntary application of the party desiring registration, who must give due notice to all parties interested in the land. A hearing by the court is provided for, and judgment is to be entered after hearing. The scheme thus seeks to embrace all the constituent elements of due process of law, and thereby obtains the desired results without depriving any one of vested rights." (*Reed* v. *Siddall,* 94 Minn. 216, 102 N. W. 453.)

A more recent case contains the statement that:

"The purpose of the registration act is to insure to the one to whom a certificate of title is issued, and to his vendees, an absolutely perfect and indefeasible title, free from all claims of every kind and nature except those expressly noted upon the certificate, and to put such title beyond attack. A subsequent purchaser has the right to rely upon such certificate as an assurance that the court which decreed its issuance had jurisdiction of the subject matter of the title, and that the holder thereof possesses a title which the law authorized to be registered." (*Shevlin-Mathieu Lumber Co.* v. *Fogarty,* 130 Minn. 456, 153 N. W. 871.)

"The statutes of the several states which have adopted the principle of the Torrens land law," said the Supreme Court of Utah, "are strikingly similar. They all have a common purpose. As stated in 3 Devlin, Real Estate (3rd Ed.) Section 1439, 'The object

is to secure the evidence of title exclusively by a certificate issuing from public authority;' or, as stated by the court in *State ex rel. Douglas* v. *Westfall*, a Minnesota case, 85 Minn. at page 439, 89 N. W. at page 175, 57 L. R. A. at page 299 (89 Am. St. Rep. 571), 'The basic principle of this system is the registration of the title of land, instead of registering, as the old system requires, the evidence of such title.' A more terse statement, and one perhaps equally clear, is that contained in defendant's brief. 'Its essential point is an official guarantee of title.' Under the old system a deed absolute on its face is only one link in the chain of evidence by which the holder must establish his title. Under the Torrens system and statutes modeled thereon the registered certificate is conclusive evidence of the holder's title. It imports the sanctity of a final adjudication of a court of competent jurisdiction. This is the ultimate purpose of the statutes." (*Ashton-Jenkins Co.* v. *Bramel*, 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.)

In the State of Washington the Supreme Court of that State has said that it is the "obvious purpose of the Torrens act to create an absolute presumption that the certificate of registration in the registrar's office at all times speaks the last word as to the title, thus doing away with secret liens and hidden equities. This is accomplished by the simple plan of making the act of conveyance and the fact of notice by record simultaneous in performance and effect. The Torrens system makes this simultaneous quality inevitable by making both conveyance and notice of record performable, and performable only, by the one act of registration. This is the distinctive feature, the vital principle of the Torrens system. It is the very essence of the plan. For the courts to refuse to recognize and enforce it would be to emasculate the law and, by construction, make it not the Torrens system of land titles, but a mere change in the *form* of the record, a mere modification of the recording act." (*Brace* v. *Superior Land Co.*, 65 Wash.

681, 118 Pac. 910; *McMullin & Co.* v. *Croft,* 96 Wash. 275, 164 Pac. 930, reversing on rehearing 92 Wash. 411, 159 Pac. 375.)

V.

Torrens Acts should be liberally construed to effect certainty against the unknown.

The leading Torrens case in the United States as to unknown claimants under the Torrens Acts is *Tyler* v. *Judges of Court of Registration,* 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, writ of error denied, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252. It has been quoted repeatedly.

In *American Land Co.* v. *Zeiss,* 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82, the Supreme Court of the United States, quoting, approved the following words of the Supreme Court of California:

> "The power of the State as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent, it is necessary that it should be made to operate on all interests, known and unknown. As was said by Holmes C. J., in *Tyler* v. *Judges of the Court of Registration,* 175 Massachusetts 71, in speaking of a statute which, in the particular under discussion, was similar to ours: 'If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants—indeed, certainty against the unknown may be said to be its chief end—and unknown claimants cannot be dealt with by personal service upon the claimant.'"

In *Crowell* v. *Akin,* 152 Ga. 126, 108 S. E. 791, 19 A. L. R. 51, the Supreme Court of Georgia said:

> "The object of the land-registration acts will be further noticed in a subsequent division of this opinion; but it will be helpful to call attention at this point to some of the essentials of title to land nowhere to be

discovered of record under the system of evidencing title heretofore existing in this State. Among these were: the genuineness of signatures of grantors and of attesting witnesses in recorded deeds; jurisdiction and authority of official witnesses; status and identity of persons professing to be heirs at law; full age of grantors and donees; sanity; the fact and validity of marriage and divorce; prescription; adverse possession; the power and authority of corporate officers; the validity of tax deeds (depending upon whether the levy was excessive, etc.). Other illustrations might be given. The land-registration act is therefore a remedial statute and should be liberally construed 'according to its intent, so as to advance the remedy and repress the evil.'"

This liberality of construction is required by the statute itself in Illinois for Section 109 of the Torrens Act (Cahill's Illinois Revised Statute, 1929, Ch. 30, Sec. 151) provides:

"This act shall be construed liberally so far as may be necessary for the purpose of affecting (effecting) its general intent."

VI.

Under Torrens laws the act of registration by the Registrar is the operative act to convey or affect land.

It has been aptly said that the estate conferred by registration under the Torrens System is neither the common law legal estate, or seisin, nor the statutory seisin of the Statute of Uses, nor the equitable estate of English equity jurisprudence, but a new statutory estate; a registered estate (Hogg's Australian Torrens System, p. 766):

"The most logical view to take, of the relation between the legal estate of the general law and this registered estate, is that the legal estate is not exchanged for the new statutory estate, but that it either remains in the first registered proprietor—where he actually has it—notwithstanding all subsequent transactions

with the land, or, if not vested in the registered proprietor, is left outstanding altogether, and in either case, unless turned into an equitable right, becomes nugatory so far as any practical rights are concerned. With the disappearance for practical purposes of the legal estate disappears also all necessity for any common-law seisin, the formality of registration being, in fact, substituted for seisin or possession. In a sense the former owner's fee-simple may be said to have become vested in the registered proprietor, but this appears to be even less accurate than to say that by virtue of the Limitation Acts the fee-simple of the person who is barred by twenty years' possession of an intruder is vested in that intruder. The relation, in fact, between the rights of a person who has occupied land for the statutory period under a Limitation Act, and the person in whom the legal fee-simple is vested by documentary title, is closely analogous to the relation which exists between the statutory fee-simple conferred by due registration under the Torrens System, and an outstanding legal estate in fee-simple which is not recorded in any way on the register. In each case the owner of the 'legal estate' of the general law has for all practical purposes lost his property in the land; in each case the new owner has statutory rights which are undistinguishable, in point of practical value, from the 'estate' of the former owner, and are cognizable in the courts as identical with or equivalent to the most complete rights of property allowed by the law—in other words, the new owner has a new 'estate in fee-simple.'" (Hogg's Australian Torrens System, pp. 769-770.)

The Torrens System is not in effect a departure from the common law method of dealing with titles to real estate. It is the outcome of a long continued struggle to return to the "single estate" system which prevailed in England before the development of uses by the court of chancery. There were five methods of conveying real property at common law: First, by livery of seisin; second, by deed; third, by parol or by parol and entry; fourth, by record; fifth, by special custom.

Conveyances by special custom seem to have been confined to copyhold estate, and were ancient forms by which the tenant surrendered the tenements into the hands of the lord to the use of the grantee. And when this was done the lord was said to have "admitted" the new tenant, and that the old tenant had "surrendered" the tenement to the lord. A most valuable analogy may be made between the system of copyholds in England and the Torrens Systems. If a precedent is needed in the common law for the Torrens System under our due process of law constitutional provisions, that precedent may be found in the English system of copyholds. (Hogg's Australian Torrens System, p. 780.)

The registered estate created by a Torrens Act is necessarily legal in the sense that courts both of law and equity are bound to recognize and give effect to it. It is a statutory right which is none the less a right of proprietorship because it may be qualified as to the mode of disposing of or using the property. (Hogg's Australian Torrens System, p. 769.)

The fact that deeds or other instruments of conveyance which have been long in use as a means of dealing with non-registered property may be permitted under certain restrictions to be used as a method of initiating a transfer of title under the Torrens Act does not mean that those deeds or other instruments of conveyance have like effect under the Torrens Act as they have with non-registered property.

> "Under the Torrens System instruments are merely vehicles for obtaining registered title, and, when once registered, all defects therein, so far as subsequent purchasers are concerned, are cured, whereas under the recording system the deeds remain the essential links in the chain, and the recording of such deeds does not cure inherent defects therein. In other words, under the Torrens System an intending purchaser may ig-

nore preceding instruments altcgether, relying solely on his vendor's certificate of title. Under the registration of deeds statute he has, as under the common law, to look to the preceding instruments themselves." (Kerr's Australian Lands Titles (Torrens) System, p. 13.)

The effect of any deed or other instrument dealing with registered land is dealt with in Section 54 of the Illinois Torrens Act (Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 102), as follows:

> "*A deed,* mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding five years where the land is in actual possession of the lessee or his assigns, *shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register* the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this act. *On the completion of such registration,* the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

Section 47 of the Illinois Torrens Act (Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 95), provides:

> "A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, *may execute* to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. *And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferer has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the*

> *transferee has the right to have such estate or interest transferred to him,* he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and folium in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled.'"

Section 52 of the Illinois Torrens Act (Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 100), provides:

> "Like forms of deeds, mortgages, leases or other instruments as are now or may hereafter be sufficient in law for the purpose intended, *may* be used in dealing with registered land in any estate or interest therein."

In other words, although like forms of deeds *may* be used under the Torrens System as under the old recording system, *the effect of their use is totally different.* Nor is the use of a deed the *only* method of obtaining a registered title.

In their briefs appellants have based their entire argument upon the claim that the Registrar of Titles can only act upon a deed or other written instrument executed by the registered proprietor, and have asserted that if such deed or other instrument was a forgery, any subsequent act of the Registrar of Titles, *no matter what the circumstances may be,* is void.

The fact that appellants are acting upon a wrong theory is illustrated both by the Illinois Torrens Act and by cases which the appellants have themselves cited.

One patent illustration in the act is found in that the Illinois Torrens Act provides not only for transfers but for transmissions.

"The distinction between 'transfer' and 'transmission' is rather practical than theoretical. Theoretically the two should stand for operations which are much of the same kind. Practically 'transfer' is applied to cases where an interest is vested in a new proprietor by means of the presentation and immediate registration of a statutory instrument—*i. e.*, one in prescribed form—executed by the transferring proprietor; 'transmission,' to cases where the new proprietor gets on the register by presenting—not a statutory instrument, but—evidence of a general kind that he is entitled to be placed on the register in place of another proprietor, whose name must be removed from the register to make way for him. In the case of 'transfer' the production of a statutory instrument duly signed and witnessed is usually sufficient warrant for the entry forthwith of the new proprietor on the register; in the case of 'transmission' the evidence produced is usually scrutinized with more or less care, and the entry of the new proprietor is not so much a matter of course. The result of both operations is by registering, in one case, the statutory instrument, and in the other by registering—not any particular instrument, but—the person who claims to be entitled. In each case the person entitled becomes the registered proprietor." (Hogg's Australian Torrens System, p. 895.)

Examples of "transmissions" rather than "transfers" under the Torrens System would be such things as bankruptcy, insolvency, joint tenants becoming entitled by right of survivorship, sales under attachment or execution, transmission by will or intestacy, etc. A mere statement of such cases is sufficient to disprove the assumption of appellants that the Registrar of Titles cannot or must not act without the consent of the former registered proprietor. The Registrar of Titles is not only entitled to act, but in some cases must act, on evidence of a general kind that a person is entitled to be placed on the register in place of another proprietor.

Thus in the matter of a joint tenancy of husband and

wife, on the death of the husband it has been held that the fee vested in the wife, as survivor of the joint tenants, upon the husband's death, by operation of law, and even though the survivor did not file with the Registrar of Titles a memorial of the death of one of the joint tenants, the death could be proved in the petitioner's proceeding to remove the memorial of a judgment against the deceased joint tenant. (*Peoples Trust and Savings Bank* v. *Haas,* 328 Ill. 468, 160 N. E. 85.)

So also in the case of *Hooper* v. *Haas,* 332 Ill. 561, 164 N. E. 23, cited on page 24 of appellant's brief, the Supreme Court held that in a proceeding against the Registrar of Titles to have a certificate of title issued on a sheriff's deed, the grantee of the sheriff's deed took only the interest of the judgment debtor charged with whatever equities existed against him, and in that proceeding the Village of Riverside was able to prove the dedication of part of the property as a public street although the dedication had never been registered, and the Registrar of Titles was ordered to issue the certificate of title to the grantee under the sheriff's deed subject to such easement so proven.

So also Sections 70, 71 and 72 of the Torrens Acts of Illinois (Cahill's Illinois Revised Statutes, 1929, Ch. 30, Secs. 118-120) provide for transmission by will or intestacy on the death of the registered proprietor.

It is thus apparent, without further citation of instances, that a deed or other written instrument of conveyance is not the only method of procuring registration by the Registrar of Titles.

Yet in every case the registration by the Registrar of Titles whether on a transfer or transmission is the operative act which places a new person in the position to deal with the title as the registered proprietor.

In the late Canadian case of *Dobek* v. *Jennings* (1928), 1 D. L. R. 736, the court said:

> "The principle of the Act is that a person may ascertain the state of the title by a reference to the records of the Land Titles Office and the person who is the registered owner has the right by transfer duly registered to convey a good title to a bona fide purchaser subject only to what appears on the register and the reservations and exceptions of s. 57. *It is registration that gives or extinguishes title.* A right or interest without title may be protected by caveat but without such protection it may be lost entirely. This has been declared in frequent decisions."

The wording of the various Torrens Acts may differ in the United States, but the central idea of all of them remains the same that the act of registration is the operative act to convey title. In some statutes the exact words have been used.

Thus in *Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, the Court said:

> "*The act of registration is the operative act to convey title*, Sec. 50; and by the act of 1898, the assistant recorder does it unless in doubt. Sections 53, 55, 57, 58, 61, 62, 63. It is said that as his decision affects title it must be judicial. But here again it is necessary to use a certain largeness in interpreting broad constitutional provisions. The ordinary business of registration is very nearly ministerial. There is no question to be raised or which can be raised. If there is a question, either raised by any party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision. Sec. 53. But whatever may be thought of the original act, by amendment even the ordinary business is to be done only 'in accordance with the rules and instructions of the court.' St. 1899, c. 131, Sec. 8. Under this amendment registration is the act of the court. The fact that it may be done by the assistant recorder under general orders when there is no question is not different from the power of the clerk to enter judgment in cases ripe for judgment under a

general order or rule of the Superior Court. It should be observed that by Sec. 55 the production of the owner's duplicate certificate whenever any voluntary instrument is presented for registration is conclusive authority from the registered owner for the entry of a new certificate or the making of a memorandum of registration, and that a registration procured by presenting a forged certificate, etc., is void."

So in the late case of *In re Juran,* ..... Minn. ....., 226 N. W. 201, the Supreme Court of Minnesota said:

"The purpose of the Torrens Law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, with certain unimportant exceptions, to the end that any one may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered. The law was framed to accomplish that purpose; and it establishes rules in respect to registered land which differ widely from those which apply in the case of unregistered land. It provides that the holder of a certificate of title of registered land 'shall hold the same free from all incumbrances, and adverse claims, excepting only' those noted on the last certificate of title and certain other specified rights or claims not important here. Mason's Minn. Stat. 1927, 8271. It declares: 'No voluntary instrument of conveyance purporting to convey or affect registered land, except a will, and a lease for a term not exceeding three years, shall take effect as a conveyance, or bind or affect the land, but shall operate only as a contract between the parties, and as authority to the registrar to make registration. *The act of registration shall be the operative act to convey or affect the land.*' Mason's Minn. Stat. 1927, 8293. The next section provides that all instruments of every kind and nature purporting to affect the title 'shall be notice to all persons from the time' they are registered with the registrar. The deeds under which plaintiff claims and the contract under which the Frieds claim were not registered, and therefore, by force of the statute, they had no effect on the title and created no rights in the land."

So also it has been held that possession of real estate taken after the title thereto has been duly registered is not notice of any rights therein to one who is a good faith purchaser for value.

Sterling National Bank v. *Fischer*, 75 Colo. 371, 226 Pac. 146.

Bjornberg v. *Myers*, 212 Ill. App. 257.

In re Abrahamson v. *Sundman*, 174 Minn. 22, 218 N. W. 246.

In the latter case, the Supreme Court of Minnesota said:

> "No contract or deed concerning registered land can take effect as a conveyance, or bind or affect the land except as authority to registrar to make registration. '*The act of registration shall be the operative act to convey or affect the land.*' *Section 8293.* A Torrens title being created by a decree of court and protected by statute so that no one may thereafter acquire any right, lien, or interest therein by or through possession or occupation, no reason is apparent for making the occupant, who by no memorial or notation upon the certificate of registration is connected with the title, a party defendant in any action foreclosing a mortgage or mechanic's lien duly registered."

It is true that in four states, as stated on page 14 of appellant's brief, there are express provisions of the statutes relating to the effect of forgery on a registration of title. The majority of the Torrens Acts in the various American states and territories, however, contain no such provisions as those cited. It is also very doubtful whether even in those states the courts would hold that a purchaser in good faith relying on the genuine certificate and the genuine deed from the holder of such certificate would not be protected. At best, the very fact that there is such an exception in those four states proves the generality of the rule that registration is the operative act to transfer title and the exceptions as to the conclusiveness of such registration must be found in the act itself.

In Kerr's Australian Lands Titles (Torrens) System, page 34, it is said:

> "Each entry on the folium of the Register Book of the fact of a transfer of the fee simple is, in effect, the issue of a new certificate of title to the transferee in respect of such fee simple; and is, moreover, in effect a fresh grant of land from the Crown. Upon a transfer of the fee simple to a transferee, the folium or certificate of title will be cancelled, if the transferee so desires, and a new folium created in respect of such fee simple, which new folium contains no record of previous transactions (other than existing mortgages, easements, reservations, and encumbrances), so that the transferee becomes possessed of a fresh certification by the Crown of his title to his estate in the land specified therein."

So in America under our American Torrens Acts on each registration by the Registrar of Titles it is in effect a new grant from the state and a certification under the authority of the state as to such new grant.

There is nothing new or startling in this theory. As previously stated, it is the old English copyhold method of transfer. So in private business today a man thinks nothing of having real estate in which he is interested held by a corporation, a partnership or a trust with the possibility that by the acts of those interested in or managing such corporation, partnership or trust he may ultimately suffer a loss. The immense growth of Massachusetts business trusts and the creation of immense industrial corporations shows the necessity of those comparatively modern methods of doing business. There is equally good reason for the existence of the Torrens System of land title registration in modern business life wherein the spectre of unknown claims is not constantly arising, and the action of one man can be final, provided sufficient safeguards are placed around the actions of that man. So also there is equally good reason for saying that, just as a man may enter into a corporation,

partnership, or business trust and thereby vest others with authority over his property, so he may *voluntarily* enter into an optional method of dealing with land titles inaugurated by the state in which a public officer designated by the state is empowered to act with reference to his property.

VII.

Conditions and requirements of act voluntarily assumed.

The effect of bringing land under the Torrens system in Illinois is succinctly stated in the opinion of the Supreme Court of Illinois in this case. A part of that opinion is as follows:

> "In determining whether the statute is unconstitutional its various provisions must be considered as a whole. The act is optional in the various counties of the State. It is not compulsory in any county and can only become operative by a vote of the people, as provided in section 110. After it has been adopted by a county it is not compulsory as to any person owning land in the county. No one is required to register his land unless he sees fit to do so. When an owner brings his land under the act he presumptively does so with notice of all of its provisions and requirements, including its rights, privileges and obligations. When he does voluntarily submit his land to the operation of the act he has no cause to complain that the act is unconstitutional. (*Victor Chemical Works* v. *Industrial Board*, 274 Ill. 11; *Dietz* v. *Big Muddy Coal Co.*, 263 *id.* 480; *Crooks* v. *Tazewell Coal Co.*, 263 *id.* 343; *Deibeikis* v. *Link-Belt Co.*, 261 *id.* 454.) Under Section 46, when land is registered there is an implied agreement, which runs with the land, that the same shall be subject to the terms of the act and to all amendments and alterations thereto. Upon the original application to register, the statute requires that all persons interested or in possession shall be made parties defendant; that there shall be personal service or service by publication on all defendants; that there shall be a full and

complete hearing, with ample opportunity to all parties to present and preserve their rights. Section 36 provides for the preservation with the registrar of the original certificate of title issued and the delivery of a duplicate certificate to the applicant. Section 37 provides for the preservation of the evidence of the handwriting of the holder of the duplicate certificate, and that his receipt therefor, in his handwriting, shall be prima facie evidence of the genuineness of his signature. After the hearing, if a certificate is granted, the effect of such certificate is specified in Sections 40 and 42 above noted."

"The land in this case was first registered in the names of the Haleys and a certificate was issued to them. When appellants bought it they knew the title had been registered, and they took it subject to all the rights, privileges and obligations of such registration and the law applicable thereto. They were under no obligations to buy, but when they did buy and registered their title they came under all of the provisions of the act and were presumed to know all of its terms."

Eliason v. *Wilborn*, 335 Ill. 352, 167 N. E. 101.

See also *Evans* v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

VIII.

Voluntary registration is the creation of new rights, not the waiver of future rights.

From a constitutional standpoint the bulwark of the Torrens system of land title registration is the voluntary nature of the initial land title registration proceeding.

In their brief appellants rest their entire arguments upon the assumption that an initial registration proceeding under a Torrens Act is an attempt to waive constitutional guarantees as to future transactions and dealings with the land, the title to which is registered. Nothing could be farther from the truth.

We have already seen that the enactment of a Torrens Act in a state introduces a new classification of property, and that in the State of Illinois that classification of property into registered and non-registered land has been held to be reasonable and constitutional.

On the one hand in the State of Illinois there is one great class of property which is still under the old recording system. There is another great class of property which is under the Torrens system. To deny that the legislature may create a new classification of property with new rights and liabilities and new methods of dealing with the same, where the inclusion of any particular property in such classification is dependent upon the voluntary action of the owner, is to deny the right of the state to change the older methods of dealing with real property and, on the other hand, to deny the owner of real property the right to deal with it as he sees fit.

The bringing of land under the act by voluntary act of the owner is a change from one class of property to another. It is the giving up of old rights and liabilities and the creation of new rights and liabilities. It is a permanent abandonment of an old method of dealing with property for a new method of dealing with property. The only rights under the newer system are registered rights. When a constitutional provision is invoked that constitutional provision must be read with reference to those registered rights and not with reference to the rights and liabilities as existed under the recording system.

Under the recording system the deed is everything; under the Torrens system the registration is everything. Any constitutional guarantee must be read with reference to those differences.

The right of the Registrar of Titles to act is fixed at the very moment of the decree of registration, and the decree

of registration in itself is but an order on the Registrar to exercise that right. It is a continuing right which runs as a covenant with the land, voluntarily assumed by the owner of the land at the time of registration. When exercised it cannot be said to be by virtue of a waiver of some constitutional guarantee; it is by virtue of the creation of his right to act in place of the owner by voluntary act of the owner in bringing his land within the new classification.

This was early recognized in a leading case in Massachusetts. In *Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, the Supreme Court of Massachusetts said:

> "Neither can such an act be held unconstitutional because there is no provision for notice before registration of transfers or dealings subsequent to the original registration. It must be remembered that at all later stages no one can have a claim which does not appear on the face of the register. *The only rights are registered rights, and when land is brought into the registry system there seems to be nothing to hinder the legislature from fixing the conditions upon which it shall be held under that system.* Furthermore, in deciding whether substantial justice is done it is to be borne in mind that ordinary cases will present no question at all. It is contemplated that if there is a question to be discerned it shall be referred to the court, and of course that the court will order notice to any party interested. Such supplementary references to the court show an intent that no one shall be concluded without having a chance to be heard, and although such methods may be new, they cannot be held insufficient in form or substance on that account."

The words of the Supreme Court of Massachusetts in this case might well have been written concerning the Illinois Torrens Act, with respect to the reference of questions to the court as well as the rights created.

The essential point to be kept in mind as to appellants' contentions is that voluntary registration is the creation of

new rights under a new classification, and not the waiver in the future of rights which could only exist under the old classification and which were abandoned once and for all time by bringing the land under the Torrens Act.

Dealings subsequent to initial registration of land may be classified as voluntary and involuntary. Where the dealings are voluntary, as in the case of transfers, mortgages, leases, etc., the parties dealing with the land know or should know that the title has been registered, and they take it subject to all of the rights, privileges and obligations of such registration and the law applicable thereto. They are under no obligations to so deal with the land, but when they do so deal and register their right, title and interest they come under all of the provisions of the act and are presumed to know all of its terms.

Eliason v. *Wilborn,* 335 Ill. 352, 167 N. E. 101.

Where the dealings are involuntary, and adverse to title of the registered owner, as in the case of attachments, judgments, liens, etc., the party attempting to deal with the title of the registered owner stands in the shoes of the registered owner insofar as his right, title and interest is concerned. He finds the land as registered land, and if he wishes to subject the title of the owner to his adverse claim, he must deal with the land as he finds it and in enforcing his remedies is subject to all the provisions of the Torrens Act as to such remedies.

Hooper v. *Haas,* 332 Ill. 561, 164 N. E. 23.

IX.

Equal protection does not guaranty equality of operation.

The fact that all real property in the State of Illinois is divided into two great classes—registered and non-registered—does not mean that equal protection of the laws requires identical operation of the laws in both classes.

In *Stebbins* v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884, the Supreme Court of the United States said:

> "The guaranty of the 14th Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state. As was said in *Magoun* v. *Illinois Trust & Sav. Bank, supra*, at page 293 (42 L. Ed. 1042, 18 Sup. Ct. Rep. 594):
>
> " 'It only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax "A" more than "B," but if "A" be of a different trade or profession than "B," it may. In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion.' "

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 293, 18 Sup. Ct. Rep. 594, 42 L. Ed. 1037, the court said:

> "The clause of the Fourteenth Amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax cases*, 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects to

which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed."

Again in *Williams* v. *Walsh*, 222 U. S. 415, 32 Sup. Ct. Rep. 137, 56 L. Ed. 253, the court said:

"It is not necessary to do more than repeat what we have said many times, that a classification which is not arbitrary is not repugnant to the Constitution of the United States. We may add that 'the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus discriminate between the rights of an earlier and later time.' *Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502, 505."

In *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142, the Supreme Court of the United States said:

"It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed."

And in *Joslin Co.* v. *Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1107, it was held that:

"A statute providing for the taking of land for public use does not deny the equal protection of the laws by granting the owner of any business on the land established prior to the passage of the act the right to recover for injury thereto, while withholding such compensation from those whose businesses have been established since." P. 675.

In the petition filed in this case there is not one word which would indicate that the same means and methods are not applied impartially to all the constituents of the class

of registered property nor is there one word in the petition to indicate that the Torrens law does not operate equally and uniformly upon all persons in similar circumstances.

X.

Mere error of judgment by Registrar of Titles is not a violation of the equal protection clause of the Fourteenth Amendment.

In *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154, the Supreme Court of the United States said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. * * * It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

In the petition filed in this case, if in fact, the Registrar of Titles acted upon a forged deed, which the Registrar of Titles does not admit, the most that can be claimed is an error of judgment on the part of the Registrar of Titles as to the genuineness of the signature to the deed. The certificate of title was admitted to have been genuine, the duplicate contract of sale signed by petitioners is admitted to have been genuine and only the deed is claimed to have been a forgery. There is not one word in the petition which would indicate intentional and arbitrary discrimination.

Assuming everything stated in the petition to be true, the most that can be claimed concerning it is that there was an error of judgment on the part of the Registrar of Titles as to the genuineness of the signature to the deed. This would not amount to a violation of the equal protection clause of the Fourteenth Amendment.

XI.

Due process clause does not render law incapable of progress or improvement.

The fact that the Torrens system of land title registration is a product of the last seventy-five years and is not in vogue in all of our states does not render the law unconstitutional, nor make it assailable under the due process clause of the Fourteenth Amendment. Courts are wisely setting their faces forward and not backward in the interpretation of the Fourteenth Amendment.

In *Tyler* v. *Judges of Court of Registration,* 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, the court said:

> "The prohibition in the Fourteenth Amendment of the Constitution of the United States against a state depriving any person of his property without due process of law, and that in the twelfth article of the Massachusetts Bill of Rights, refer to somewhat vaguely determined criteria of justification, which may be found in ancient practice; *Murray* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 277; or which may be found in convenience and substantial justice although the form is new. *Hurtado* v. *People,* 110 U. S. 516, 528, 531. *Holden* v. *Hardy,* 169 U. S. 366, 388, 389. The prohibitions must be taken largely, with a regard to substance rather than to form, or they are likely to do more harm than good. It is not enough to show a procedure to be unconstitutional to say that we never have heard of it before. *Hurtado* v. *People,* 110 U. S. 516, 537."

In *Hurtado* v. *California*, 110 U. S. 516, at p. 528, the Supreme Court of the United States said:

"It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272. There Mr. Justice Curtis, delivering the opinion of the court, after showing, p. 276, that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows:

> "'To what principle, then, are we to resort to ascertain whether the process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'

"This, it is argued, furnishes an indispensable test of what constitutes 'due process of law'; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law."

"But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due

process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

XII.

Due process clause only restrains arbitrary and unreasonable exertions of power by state.

In *American Land Co.* v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82, the Supreme Court of the United States said:

> "It is to be borne in mind that it has been settled (*Griffith* v. *Connecticut*, 218 U. S. 563, and cases cited) that the Fourteenth Amendment does not operate to deprive the States of their lawful power, and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

The criterion, therefore, of whether the provisions of a state statute are repugnant to the due process clause is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the matter deals.

XIII.

Due process does not forbid discretionary powers in Registrar.

Due process of law does not necessarily mean a judicial proceeding. A general law administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons similarly situated alike, is due process.

In *Dreyer* v. *Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79, the Supreme Court of the United States said:

> "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.' Story's Const. (5th ed.) 393. Again: 'Indeed, there is not a single constitution of any State in the Union which does not practically embrace some acknowledgment of

the maxim, and at the same time some admixture of powers constituting an exception to it.' Story's Const. (5th ed.) 395.

"The objection that the act of 1899 confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due-process clause of the Fourteenth Amendment."

XIV.

The adequacy of the safeguards which the statute provides against wrongful acts or omissions of the Registrar.

Under the heading "the statute affords an owner no safeguard against the unlawful taking of his property," appellants would have this honorable court believe that an owner of Torrens property is liable at any time to lose his property through forgery, and that possession of the owner's duplicate certificate of title is the only safeguard provided which may be obviated by a forger obtaining a new certificate by a false affidavit.

Perhaps the best answer to make to this unwarranted assertion is the fact that since March 1, 1899, when the first certificate of title was issued by the Registrar of Titles of Cook County, there have been over 250,000 certificates issued and nearly 500,000 documents registered. In all that thirty-one years and with that number of certificates and documents there have been exactly three claims of forgery to date.

The first claim was made by a husband who asserted that his wife and nephew had forged his name to a deed, executed a mortgage and obtained the proceeds thereof, and disappeared. The Torrens office located the wife and nephew, had them indicted, and the husband then confessed that his signature was genuine, and the whole proceeding was intended to defraud the Torrens office.

The second proceeding was one involving the same man Napletone, who is claimed to be the forger in this case. The circumstances were claimed to be similar. On a trial in the Circuit Court of Cook County it was proved that the signature was genuine, and the matter was one of misplaced confidence on the part of the petitioner and not a forgery.

The third proceeding is the present case. The Registrar of Titles was not served in this case, but respectfully submits that even though the facts are admitted by demurrer, they show misplaced confidence and that the loss should fall on petitioners and not an innocent purchaser. The Registrar of Titles did not join in the demurrer and does not desire to admit that there was a forgery in this case, even though it must be argued as such from a standpoint of law.

In other words, in thirty-one years of actual practice, there has not been a case of forgery actually proved in the Torrens office, and the present case comes up on demurrer and not on facts actually proved.

There is a reason behind this record. That reason lies in the safeguards provided by the Torrens Act itself. We merely enumerate them because the words of the statute tell their own story.

(a) The certificate of title must contain identifying facts which will enable the Registrar to know that he is dealing with the proper party. Section 33 (Cahill's Ill. Rev. St., 1929, Ch. 30, Section 81), provides:

> "Every certificate shall bear date the day and year of its issue, and be under the hand and official seal of the registrar, and be numbered in the order of its issue. It shall state whether the owner (except in the case of a corporation) is married or not married, and if married, the name of the husband or wife. If the owner is a minor, it shall state his age, if under

any other disability, the nature of the disability. The registrar shall note at the end of the certificate, in such manner as to show and preserve their priorities, the particulars of all estates, mortgages, incumbrances and charges to which the owner's title is subject.

Section 56 (Cahill's Ill. Rev. St., 1929, Ch. 30, Section 104) also provides:

"Every certificate of title to land shall state whether the transferee (except when the latter is a corporation) is married or not married, and if married, the name of the husband or wife. The transferee shall furnish the registrar the necessary information before he shall be entitled to have the land transferred to him on the register."

(b) The handwriting of the owner is preserved for comparison with any deeds or other documents presented to the Registrar of Titles for registration. Section 37 (Cahill's Rev. Ill. St., 1929, Ch. 30, Sec. 85) provides:

"For the purpose of preserving evidence of the handwriting of the owner in his office, it shall be the duty of the registrar to take from the owner, in every case where it is practicable so to do, his receipt for the certificate of title, or whatever paper shall be issued to him, signed by the owner in person. When such receipt is signed in the registrar's office it may be witnessed by the registrar or some deputy. If signed elsewhere it may be acknowledged before any officer authorized to take acknowledgment of deeds. When so signed and witnessed or acknowledged, such receipt shall be prima facie evidence of the genuineness of such signature."

(c) The original certificate of title is retained by the Registrar of Titles and forms part of the register of titles, but an owner's duplicate certificate of title is issued to the owner. Section 36 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 84) provides:

"The registrar shall, at the same time that he makes out his original certificate of title, make out an exact duplicate thereof, with the memorials and notations

thereunder noted, which shall be delivered to the owner and shall be known as the owner's duplicate."

(d) The owner's duplicate certificate of title must be surrendered upon a transfer. (Section 47.)

(e) Proofs as to the rights of the transferer and transferee must be made to the registrar at the time of transfer. Section 47 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 95) provides:

> "A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. *And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferer has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him,* he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and folium in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled'."

(f) As a guarantee of the proper performance of his duties the Registrar of Titles in Cook County must file a $200,000 bond. Torrens Act, Section 2 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 50).

(g) If the Registrar of Titles is careless or negligent, or his deputies are careless or negligent, the Registrar of

Titles is liable on his $200,000 bond. Torrens Act, Section 6 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 54).

(h) But the Registrar of Titles is not alone bound by his bond. Behind him is the Circuit Court of Cook County. In the event of any wrongful act or omission upon the part of the Registrar of Titles, a petition may be filed in the Circuit Court of Cook County by the aggrieved party to control the action or omission to act of the Registrar of Titles. Section 93 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 134) provides:

> "Whenever any person interested in registered land, or any estate or interest therein, or charge upon the same, shall be entitled to have any certificate of title, memorial or other entry upon the register cancelled, removed or modified, and the registrar or person whose duty it shall be to cancel, remove or modify the same, shall upon request, fail or refuse to do so, or is absent from the county, or can not be found, or for any reason such request cannot be made upon him, or where under the provisions of this act the registrar has no power or authority to make a transfer until he shall have been directed so to do by an order of court, the Circuit Court of the county where the land is registered, may upon petition by the person interested, make such order as may be according to equity in the premises."
>
> "And in every proceeding in which a final decree shall have been entered directing the registration of any tract or parcel of land the court shall retain jurisdiction to enter any order which may be proper to give effect to the provisions of this section."

Section 94 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 135) provides:

> "Any person feeling himself aggrieved by the action of the registrar, or by his refusal to act in any matter pertaining to the first registration of land, or any estate or interest therein, after the first registration of any transfer of or charge upon the same, the filing or neglect or refusal to file any instrument, or to enter or

cancel any memorial or notation, or to do any other thing required of him by this act, may file his petition in the circuit court in the proceeding in which the land was registered, making the registrar and other persons, whose interest may be affected, parties defendant, and the court may proceed therein to make such order or decree as shall be according (to) equity in the premises and the purport of this act. Nothing in this section contained shall bar such person from filing an original bill or petition in such cases in equity in any court of competent jurisdiction."

(i) Such petitions to control the action of the Registrar of Titles may be filed in the Circuit Court of Cook County without the payment of any fee, making recourse to the courts as easy as possible. Torrens Act, Section 107 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 148).

(j) Damages, including reasonable attorney's fee, may be recovered from the indemnity fund for unauthorized acts of the Registrar of Titles. Section 96 of the Torrens Act (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 137) provides:

"The court may in any case contemplated in sections 93 and 94, in addition to the costs, award such damages, including reasonable attorney's fees, as it shall deem just in the premises. The damages and costs so awarded shall be payable out of the indemnity fund created by sections 99 and 100 of this act, in the manner provided by section 102 of this act."

(k) An indemnity fund is created for the payment of damages arising out of wrongful acts of the Registrar. Torrens Act, Section 102 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 143).

(l) A right of action for such damages is given against the county. Torrens Act, Section 101 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 142).

(m) And finally, notwithstanding the right to file a petition in the original land registration case without fee is given, the right of filing an original bill or petition in equity

in any court of competent jurisdiction is preserved to any aggrieved party. Torrens Act, Section 94 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 135).

In view of the foregoing provisions of the Torrens Act of Illinois it is hardly conceivable how any additional safeguards could have been afforded than are already given. The means of knowledge through identifying facts, the handwriting of the owner preserved for comparison of signatures and the right of the registrar to demand proofs of the transferer and transferee make it possible and essential that the registrar shall complete a registration on the basis of knowledge rather than ignorance. The fact that the owner's duplicate certificate must be presented makes it possible for the owner himself to make forgery difficult. The neglect or carelessness of the Registrar is guarded against by his $200,000 bond. Recourse may not only be had to the Circuit Court on petition, but that petition may be filed without fee, and if properly filed, attorney's fee may be recovered. Means of payment of damages are provided through the indemnity fund and the right of action against the county, and the right to file a general bill in equity is expressly provided.

But it is said in appellants' brief that a perjured affidavit as to a lost certificate may make it possible for a forger to produce a new owner's duplicate certificate while the old certificate remains in the true owner's possession. The answer to this is twofold. First, it is the affidavit of the owner which is required under Section 58 as to a lost certificate, and the Registrar of Titles has the means and knowledge in his possession of knowing who the owner is and the signature to the affidavit. Second, in thirty-one years' experience in the Torrens office, it has never been successfully accomplished. Such suppositious cases sound well on paper, but mean nothing in actual practice.

The Registrar of Titles respectfully submits that a law which has proved itself in the matter of protection from forgeries for a period of thirty-one years with an unbroken record as to the adequacy of its safeguard against forgery, ought not to be held unconstitutional as not due process of law on the basis of theories which have never materialized into actual facts.

XV.

Any loss which may have occurred has been due to appellants' own acts.

In closing its opinion, the Supreme Court of Illinois in this case summarized the whole case in a few words when it said:

> "The statute is not unconstitutional because it deprived appellants of the title to their property without due process of law. It makes ample provision for the protection of all persons interested. Appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute."

On page 33 of appellants' brief they emphasized the fact that they have a constitutional right to retain the property "in specie." Their argument is evidently made for the sole purpose of finding a pretext to have this honorable court declare the Illinois Torrens Act unconstitutional, and not from any real desire to retain the property in kind.

Prior to the events complained of in their petition, they had already agreed to sell and convey the property to George B. Kennedy and Pearl A. Kennedy, his wife, on April 1, 1926. They were also to place a mortgage of $27,000 which was to be assumed by the purchaser. The total sale price was $6,750 of which $1,000 was paid down, $2,700 assumed by the mortgage and $3,050 was to be paid at the

rate of $60 per month. So little did they want the premises that in May, 1926, one month later, they were negotiating with Napletone to discount the balance of $3,050, and in their petition they allege "that in the course of the negotiations looking toward such sale, your petitioners entrusted to the said Napletone a duplicate original of said contract of sale and also the certificate No. 113893 evidencing the title of your petitioners in and to said premises."

A deed from petitioners to Napletone was presented to the Registrar of Titles on May 19, 1926 and registered as Document No. 303637 and certificate of title No. 167919 was issued to him by the Registrar of Titles. The petition also alleges (transcript of record page 2) "that thereafter from about May 18, 1926, until June 18, 1926, your petitioners were constantly endeavoring to obtain from Napletone either the amount which he had agreed to pay for said premises and said assignment of contract, or to obtain back from him the said certificate of title and duplicate original contract which had been entrusted to him, but without avail."

In other words, they wanted back either the certificate of title and the duplicate original contract or the amount of money from Napletone *which he had agreed to pay.* There thus is disclosed the existence of a definite agreement with Napleton for a definite price which he had agreed to pay, but did not pay. Their demand was not for an absolute return of the certificate of title and duplicate original contract, but was in the alternative for either the payment of the price agreed upon or the return of those documents.

Not only was there an agreement with Napletone but also there was an attornment by the contract purchasers, the Kennedys, to Napletone. That fact is left to be inferred from the petition. The petition avers that shortly after the execution of their contract on April 1, 1926, the Kennedys went into possession of the premises and have remained in

possession and paid the petitioners "up to the happening of the events hereinafter set forth" all payments required in and by said contract (transcript of record page 2). The "events hereinafter set forth" are immediately followed by a recitation of the Napletone deal, and in the prayer of the petition the defendants are asked "to account to your petitioners for any sum or sums paid to them by the purchasers under said contract." So it is not a violent assumption to believe that the Kennedys attorned and made payments under the contract to Napletone and to the Wilborns who purchased from Napletone.

So from May 18, 1926, until June 18, 1926, *the situation is that the owner's duplicate certificate of title is in the hands of Napletone, the duplicate original contract of sale to the Kennedys is in the hands of Napletone, the Kennedys are in actual possession of the property, and the Kennedys are making payments on that contract to Napletone and the Wilborns.* The details of the contract or agreement between the petitioners and Napletone do not appear in the petition. Evidently it provided for deferred payments or a sale on credit insofar as Napletone was concerned. The equitable, if not the legal title, passed to Napletone from the petitioners by the delivery of the duplicate original contract of purchase and the certificate of title to Napletone. *Odom* v. *Riddick,* 104 N. Car. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686. A delivery of such a contract, without written assignment, may be sufficient under the Illinois law to authorize a deed. *Snapp* v. *Peirce,* 24 Ill. 156. See also *Robinson* v. *Williams,* 40 Tenn. 540.

Without possession of the owner's duplicate certificate of title, Napletone could not have secured under any circumstances a certificate of title in his own name. Knowing this full well, and although "constantly endeavoring" to have Napletone either pay the price or return the documents, the

petitioners, who should have been put on their guard by Napletone's failure to do either allowed a full month to go by and on June 19, 1926, found that Napletone had fled.

Petitioners also aver that they protested to the Registrar of Titles against the Registrar of Titles issuing his certificate to the Wilborns who were grantees of Napletone, "but the said Registrar of Titles nevertheless on May 29, 1926, issued his certain certificate of title to the said Charles Wilborn and Carrie S. Wilborn, his wife, being certificate No. 175048." (Transcript of regard page 4.) Yet even after May 29, 1926, and up to June 18, 1926, (Transcript of record page 2) petitioners were still negotiating with Napletone and continued to do so until he fled on June 19, 1926. This petition claiming forgery was filed July 30, 1926, (Transcript of record page 1), but the Registrar of Titles whose action it was supposed to control was never served as a defendant. From the averments of the petition itself it appears that for three weeks after the issuance of the certificate of title to the Wilborns, *and necessarily for at least that time after the petitioners had full knowledge of Napletone's acts,* petitioners were still demanding from Napletone the cash which he had agreed to pay. Not until Napletone had fled did the petitioners try to shift the loss to the Wilborns, the innocent purchasers, and to the Registrar of Titles.

Attention is also called to the fact that Napletone turned over to the Wilborns the duplicate original contract with the Kennedys which admittedly bore petitioners' genuine signatures. If the deed to Napletone had forged signatures of the petitioners, and the signatures to the assignment on the back of the Kennedy contract were also forged, while the signatures on the face of the contract were genuine, the forged signatures must have been fairly good to permit Napletone to pass over a document with a genuine signature on the front and a forged signature on the back.

It must also be remembered that the Registrar of Titles had the petitioners' genuine signatures on file for comparison, and there is no allegation in the petition that the Registrar of Titles did not compare the alleged forged signatures with the genuine signatures in his possession, or that the signatures on file with the Registrar of Titles were not made by the same persons as those who signed the alleged forged instruments.

But assuming that, notwithstanding the precautions taken under the act as to genuine signatures and as to proof of the right of the transferer to make the transfer, the signature on the deed from the petitioners to Napletone was a forgery, the forgery could never have been carried through without the act of the petitioners in turning over their certificate of title to Napletone. The Registrar of Titles may have acted under an honest mistake as to the genuiness of the signature on the deed from the petitioners to Napletone, and no fraud on the part of the Registrar of Titles is claimed in the petition, yet the act of the Registrar of Titles could only be charged to mistake and not to fraud on his part and admittedly could not have been done without the petitioners having handed over their certificate of title to Napletone.

In this connection the words of Lord Hatherley in *Vickers* v. *Hertz*, L. R. 2. H. H. (Sc.) 113, are peculiarly applicable:

> "When * * * one person arms another with a symbol of property, he should be the sufferer, and not the person who gives credit to the operation and is misled by it."

This doctrine has been applied and upheld in land registration cases where the certificate of title with other indicia of title have been delivered to persons who have used them with resulting loss.

Barry v. *Heider*, 19 Commonwealth Law Reports 197.

Great West Permanent Loan Co. v. *Friesen*, 4 D. L. R. (1924) 980.

The Supreme Court of Illinois truly said that appellants lost by reason of their failure to safeguard their interests and not by reason of any defect in the statute.

XVI.

The denial of petitioners' claim by the Illinois State courts does not deprive petitioners of property without due process of law.

The petition filed in this case and which is now before this honorable court for review was filed under sections 93 and 94 of the Torrents Act without fee, being one of the safeguards which the Torrens Act has provided for owners against wrongful acts of the Registrar. The petition was not filed until after Napletone had fled, although the petitioners were aware of the facts which had transpired prior to the actual issuance of the certificate of title to the Wilborns by the Registrar of Titles. By this proceeding they attempted to lock the door of the stable after the horse had fled.

Although claiming that they now desire the property, where they have been doing their utmost to get the cash, petitioners bolstered up this claim with another that the law was unconstitutional in a special proceeding brought under the Torrens Act itself. In that proceeding their own acts were placed in issue by their own pleadings. Both the Circuit Court and the Supreme Court placed a construction on petitioners' acts which was adverse to petitioners. Having had an adverse decision in that respect petitioners are in no position to claim that they have not had due process of law even if it were granted that the decision of this court might have been different on the same set of facts.

In *Bonner* v. *Gorman*, 213 U. S. 86, 29 Sup. Ct. 483, 53 L. Ed. 709, the Supreme Court of the United States said:

"It is firmly established that when parties have been fully heard in the regular course of judicial proceedings on erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States, *Central Land Company* v. *Laidley*, 159 U. S. 103, 112."

In *Tracy* v. *Ginzberg*, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755, the Supreme Court of the United States said:

"The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the constitution, and by re on of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of. The Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty."

In *Davidson* v. *New Orleans*, 96 U. S. 97, the Supreme Court of the United States said:

"But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

So also it has been said:

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States."

Central Land Company v. *Laidley*, 159 U. S. 103.

Backus v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575.

Any other view of the law would mean that every act of every Registrar of Titles in every one of the eighteen states and territories which have Torrens Acts could be brought to the United States Supreme Court for review—a result not to be thought of.

XVII.

A genuine deed signed by the holder of a genuine certificate of title will pass good title to a bona fide purchaser, even though the prior certificate of title was based on a forged deed.

There are a number of cases on forged deeds under the Torrens system in the English Colonies which ought to be controlling in Illinois unless there is some constitutional inhibition against it. The result of those cases may be summarized as follows:

(a) Where the holder of a certificate of title obtains his certificate by reason of a forged deed in which he appears as the grantee, the register is not conclusive because the certificate holder must look to the genuiness of the deed under which he claims. (*Gibbs* v. *Messer* (1891) A. C. 248.)

(b) Everyone who purchases, bona fide and for value, from the improperly registered owner whose deed was a forgery, and becomes the registered owner himself, acquires

an indefeasible right, notwithstanding the infirmity of his grantor's title. (*Brown* v. *Broughton*, 31 Western Law Reporter, (Manitoba) 583.)

The judgment in *Gibbs* v. *Messer*, at p. 255, seems to make the reason for this distinction clear. It says:

> "The protection which the statute gives to persons transacting on the faith of the register is by its terms limited to those who actually deal with and derive rights from a proprietor whose name is upon the register. Those who deal not with the registered proprietor but with a forger, and who use his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith for onerous consideration."

In the case of *Kateneth Whakaruru and others* v. *The Public Trustee and others*, 12 New Zealand Law Reports 651, which like the case of *Gibbs* v. *Messer* (1891) A. C. 248, was decided prior to the enactment of the Illinois Act, and which our legislature must be presumed to have had in view it is said:

> "Where a purchaser does not deal directly with the registered owner it may well be that he is bound to see not only that the instrument which he presents for registration is genuine, but also that it is executed by some person duly empowered to act on behalf of, or in the place of, the registered owner. Security of title and facility of transfer are two purposes not entirely consistent, and the policy of the Land Transfer Act is to some extent a compromise between them. Still, it is obvious that the former must be in general paramount. It would be an invitation to carelessness and a temptation to fraud if persons presenting instruments for registration were allowed to be indifferent respecting their validity as conveyances by, or on behalf of, the true owner. The Act, whilst it does away with the necessity of a retroactive investigation of title, does not enable persons seeking registration to throw upon the

Registrar the whole responsibility of ascertaining that (to use the language of conveyances) the proper conveying parties have executed."

"But the case of a bona fide transferee from a person placed on the register under a void or voidable instrument does undoubtedly constitute a special case of exception, in which the security of the true owner in his holding is sacrificed to the object of facilitating transfer."

In the latter case, where a bona fide transferee takes a valid title from a registered owner whose registration was based on a forged deed, the cases hold that the remedy of the true owner is against the indemnity fund provided by statute.

In the eighteen states and territories in which there are Torrens Acts, it is undoubtedly true that there is not a single one in which it would not be held that while a certificate of title remains in the name of a party whose certificate was issued directly on a forged deed such certificate of title could and would be set aside. This is on the assumption that fraud vitiates everything as to the party claiming thereunder who is a party thereto and he cannot reap the benefits thereof. The exception of fraud as to parties participating therein would be read into a Torrens Act even though it is not expressly excepted by the act itself.

But it is equally true that the law has always protected a bona fide purchaser, and it is within the power of the legislature to give such protection. This is not only true under the Torrens laws but also under the old recording laws. Thus under the recording laws title may be passed by delivery of a deed without recording, and yet a statute may be good which will require that the deed be recorded to be good as against bona fide purchasers or creditors without notice. If the legislature has no power to protect purchasers in good faith and for a valuable consideration

who rely on a genuine deed and a genuine certificate of title then it would have to be held that the legislature would have no power under a Torrens law to protect against claims of parties under disability who may have had title while under disability and whose disability was unknown at the time. Yet it has never been claimed that the legislature of a state has no power to protect purchasers in good faith and for value against unknown and undisclosed claims. That power of the legislature is inherent in the very nature of government itself, and this phase of the Torrens law is no different from similar phases of the recording acts.

XVIII.

Appellants are bound by provisions of the Torrens Act.

In the statement of matter and grounds making against the jurisdiction asserted by appellants, heretofore filed in this cause by the Registrar of Titles, on pages 15 to 23 inclusive, the Registrar of Titles has cited a number of cases to show that appellants are bound by the provisions of the Torrens Act of Illinois through their own acts and the acts of their predecessors in title. No attempt has been made in the brief of the appellants to differentiate these cases, except to assume that they are not in point because appellants cannot bind themselves in advance by an agreement, which may be specifically enforced, to forfeit their rights at all times and on all occasions, whenever the case may be presented. (Appellants' Brief p. 345.)

It will be noticed that on page 15 of statement of matter and grounds making against the jurisdiction asserted by appellants, the heading is "Appellants bound by provisions of Torrens Act." The word "waiver" is not used in the argument by the Registrar of Titles. It is used in a few cases cited, but not in the sense claimed by appellants. The

Registrar of Titles respectfully points out that when appellants acquired title to the property in question, they did not *waive* any rights. They *acquired* the rights given them under the Torrens Act, and with those rights came any conditions annexed thereto by the legislature. "*Acquisition*" of rights is quite different from "*waiver*" of rights. At no time while appellants held title to the property was the property under the recording system. At all times it was under the Torrens System. At no time while the appellants held title was the execution and delivery of a deed the operative act for passing title. At all times the operative act for passing title was the act of registration by the Registrar of Titles. Appellants were waiving no rights under the recording system because they had no rights under the recording system. Their only rights were under the Torrens System and those rights from the minute of acquisition were coupled with the conditions annexed thereto by the legislature for holding, enjoying and ending them.

The situation in this case is largely analogous to that where a State passes title by a tax deed and couples with it the right of redemption on the payment of the amount due. In such case the Supreme Court of the United States has said (*Rusch* v. *John Duncan Co.*, 211 U. S. 526, 53 L. Ed. 312, 29 Sup. Ct. Rep. 172):

> "If the title was taken subject to redemption it cannot be said to be divested without due process of law if redemption was exercised according to law. And how redemption should be exercised and how it could be cut off depended upon the provisions of the statute and, therefore, the best answer to the assumption of plaintiff in error, that he acquired an indefeasible title, is the answer given by the Supreme Court of the State, whose province it is to pronounce the meaning of the statutes of the State without question by this court. The court said: 'The deeds which the defendant received from the State are expressly made subject to

the relevant conditions imposed by Act No. 229, Public Acts of 1897, as amended. Whatever the title which the State held, it sold to defendant (plaintiff in error) an interest in the lands which was liable to be divested.'"

The Registrar of Titles again repeats that in assuming the benefits or burdens of the Torrens Act, a purchaser assumes exactly the same benefits and burdens as everyone else in like position. Everyone is treated alike within the classification. The statute makes no discrimination and imposes no unequal condition. Removal cases cited by appellants are not in point because in all of them it was sought to force inequality of rights on those in the same line of business.

On March 24, 1797, the Legislature of New York passed an act, entitled, "An Act to settle disputes concerning the title to lands in the County of Onondaga." On a question of priority between two deeds, the Supreme Court of the United States said:

"There is no contract on the part of the state, that the priority of title shall depend solely on the principles of the common law, or that the state shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered. It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions of them, and the acts from which the time limited

shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; but the present is not one."

Jackson v. *Lamphere*, 28 U. S. (3 Peters) 280.

XIX.

Appellants' remedy is against the Indemnity Fund.

In the statement of matter and grounds making against the jurisdiction asserted by appellants (pages 24-28), it has been pointed out that appellants' remedy is against the indemnity fund. If recourse had been had to the indemnity fund, appellants whose every act in first selling the property and then attempting to discount the balance due showed a desire to obtain the cash rather than the property, if a forgery was in fact committed, would have long ago received from the indemnity fund the amount of their loss. They chose instead to come to this court on a claim of the unconstitutionality of the act, and if the case was reversed by this Court, they would first have to prove the forgery and then would only be entitled to receive the cash balance on their contract and not the property itself. It would seem that if this case had been brought in good faith, and a forgery proved, and the Registrar of Titles made a party defendant, the money from the indemnity fund would have been equally acceptable to appellants as the same amount of money from the contract purchasers.

It is also claimed in appellants' brief that the issuance of the certificate to the Wilborn's by the Registrar of Titles is a "taking" of property for private purposes without compensation. As stated in *White* v. *Ainsworth*, 62 Colo.

513, 163 Pac. 959, Ann. Cas. 1918 E. 179, what is intended as a safeguard or protection to that extent in favor of anyone who might by chance be injured without other remedy by reason of the provisions of the act, cannot be classed as a "taking" of property for private purposes.

As to the claim of appellants that the money in the indemnity fund is not used for a public purpose, the answer is apparent on its face.

The money in the indemnity fund does not come from public sources. It comes from people dealing with the land or putting land into the Torrens system. But even if it came from public treasury, it would be for a public purpose and well within the rights of the legislature. In *American Land Co.* v. *Zeiss*, 219 U. S. 47, 55 L. Ed. 82, Sup. Ct. Rep. 200, the Supreme Court of the United States at page 60 of the official reports said:

> "As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government."

If the Torrens Act is not for a public purpose, then there is not a recording act in the United States which is for a public purpose, and it would be impossible for any public money to be used in the payment of the expenses of a recorder's office. The mere statement of such a proposition carries its own refutation.

CONCLUSION.

Approximately about twenty per cent of the property in Cook County, Illinois, is registered under the Torrens System. A great bulk of this registration has come during the last twelve years. Under the reassessment now going on in Chicago the assessed valuation of real property in Cook

County will amount to over twelve billion dollars. The amount of Torrens property is valued well over a billion dollars.

This growth of registered property in Cook County has been due to satisfied owners telling others. The Torrens Office has not one penny appropriation for advertising. Neither does it pay commissions to real estate brokers and lawyers for business transacted. Yet it has grown to amazing proportions because it is the peoples' own method of dealing with real estate titles.

Because transactions can be made on the faith of the Register of Titles at a cost of $3.00 for each transaction, no matter what the value of the property may be, the delays and expense incident to the old recording system are done away with. No man can estimate the amount of money which has been saved to the people of Cook County by reason of this fact.

In speed and facility of transfer, and in simplicity, and low cost, and in adaptability to modern business conditions, the Torrens System of land title registration in Cook County has proved itself.

Its history has been one of service to the people. The adequacy of its provisions has been shown by experience. In thirty-one years of actual practice with literally billions of dollars in values handled during that period, the total losses sustained have been less than nine thousand dollars, and these have been paid out of the indemnity fund. The interest each year on the indemnity fund is more than sufficient to pay the total losses for the entire thirty-one years.

That such a system should be jeopardized by theoretical conclusions advanced in a case argued on demurrer by private individuals whose own actions show an absolute disregard for the safeguards erected by the Torrens Act it-

self would ordinarily seem incredible and monstrous. Yet this case has been advertised widely as an attempt to break down the Torrens System of land title registration by killing its theory of protection of the purchaser for value and in good faith on the strength of the certificate issued by the Registrar of Titles.

The Supreme Court of Illinois expressly said in its opinion that it was the appellants' own acts and not the Torrens law which has occasioned loss. In this the Registrar of Titles fully agrees. The Supreme Court of Illinois has passed upon the effect of those acts of appellants. The effect of those acts with reference to title to land is exclusively a matter of State jurisdiction. The Registrar of Titles therefore respectfully suggests that no federal question is involved, and the appeal of appellants should be dismissed.

Respectfully submitted,

CLAYTON F. SMITH,
Registrar of Titles of Cook County, Illinois.

By J. SCOTT MATTHEWS,
His Attorney and Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON AND ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN AND NOEL STATE BANK,
Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

BRIEF OF APPELLEES.

FLOYD E. THOMPSON,
HENRY JACKSON DARBY,
Solicitors for Appellees.

DUNLOP-GARVEY PRINTING COMPANY, CHICAGO.

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BRIEF OF APPELLEES.

MOTION OF COOK COUNTY REAL ESTATE BOARD TO APPEAR AS AMICUS CURIAE AND TO JOIN IN BRIEF OF APPELLEES.

Appellees, Charles and Carrie S. Wilborn, defended this suit in the Circuit Court of Cook County and the Supreme Court of Illinois, but did not feel financially able to continue to bear the burden alone and to employ counsel to follow the appeal here. With their approval, and in co-operation with the Registrar of Titles of Cook County, Illinois, the Cook County Real Estate Board of Chicago, Illinois, have employed members of this bar to

represent appellees and to defend the interests of the people of Cook County, Illinois, in this case. The Cook County Real Estate Board is composed of 924 real estate dealers and others interested in real estate titles in Cook County. These members own much valuable land registered under the Land Titles Act of Illinois and represent thousands of clients who own millions of dollars worth of registered lands.

The members of the Cook County Real Estate Board are vitally interested in this litigation and they join the Registrar of Titles in asking leave to appear as *amici curiae,* and to join in this brief of appellees.

Respectfully submitted,

FLOYD E. THOMPSON,
HENRY JACKSON DARBY,
Solicitors for Cook County Real Estate Board and of Counsel for the Registrar of Titles.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON AND ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN AND NOEL STATE BANK,
Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

We are of the opinion that a proper presentation of this case requires us to supplement the statement of the case by appellants by adding (1) an analysis of the petition filed by appellants in the Circuit Court of Cook County, Illinois, (2) an analysis of the Illinois Act Concerning Land Titles of May 1, 1897, (3) a history of land title registration acts, commonly known as the Torrens System of Land Title Registration, and (4) a statement of the points that were presented for decision to the Supreme Court of the State of Illinois.

ANAYLSIS OF THE PETITION FILED IN THE CIRCUIT COURT OF COOK COUNTY.

The petition filed by appellants in the circuit court of Cook County is unusually significant.

(1) It is a petition expressly—and *solely*—authorized by the Land Title Registration Act, which appellants now say is contrary to the Fourteenth Amendment to the Federal Constitution.

(2) It conclusively demonstrates that appellants voluntarily accepted this purely elective act.

(3) It proceeds upon the assumption that the act requires that appellants be granted the relief asked.

(4) It does not predicate appellants' alleged right to relief upon any actual or contingent conflict between the act and the Fourteenth Amendment. On the contrary, *it seeks to protect a claimed antecedent and paramount title that had been acquired and registered pursuant to the act and never existed apart from it.*

(5) It shows that whatever loss appellants may ultimately suffer is directly attributable to their own negligence and not to any provision of the act.

This proceeding is brought pursuant to sections 93 and 94 of the Land Title Registration Act (R. 17) by filing a petition "in the circuit court in the proceeding in which the land was registered" originaly. Appellants did not seek relief by a bill in equity or other appropriate proceeding, but asked relief which can be had under—and *only* under—an act which they now say is void.

Appellants allege in their petition that "by virtue of a

decree of this court made and entered in the above entitled cause on the 6th day of August, A. D. 1921", the real estate in controversy "was duly registered in the office of the registrar of titles in and for said county, in the names of Edward J. Haley and Mary A. Haley, • • • and a certificate of title was *duly issued* to them therefor" (R. 1,) and then that "by mesne and sundry conveyances and transfers the *title* to said premises *has passed and become vested in your petitioners*, Edward Eliason and Elin Eliason, • • • and that a certificate numbered 113893, *registering* the *title* to said premises in your petitioners, was *duly issued* out of the office of the registrar of title in and for said county, on September 21, 1923, and *duly entered* in Register Volume 197, at page 308." R. 1-2.

Appellants also alleged "that in the month of May, 1926, they entered into certain negotiations with one Jerome C. Napletone, doing business as Bankers' Discount Company, for the sale to the said Napletone" of the real estate in question, subject, among other things, to a contract for its sale to George B. Kennedy and his wife, made April 1, 1926, and that "in the course of the negotiations looking toward such sale, your petitioners *intrusted* to the said Napletone a duplicate original of said contract of sale and also the *certificate* No. 113893 *evidencing* the *title* of your petitioners in and to said premises", and "that thereafter, from about May 18, 1926, until June 18, 1926, your petitioners were constantly endeavoring to obtain from said Napletone either the amount which he had agreed for said premises and said assignment of contract, or to obtain back from him the said certificate of title and duplicate original contract which had been intrusted to him, but without avail; that on said *June 19, 1926*, your petitioners found the office before that time occupied by the said Napletone closed,

and were informed from other sources that the said Napletone had defrauded various people in the City of Chicago and had fled from said City of Chicago and State of Illinois." R. 2-3.

Appellants then allege "that immediately thereafter" —that is, *after June 19*—appellants went to the office of the registrar of title where, for the first time, they learned the following facts:

(1) That on *May 19, 1926*, Napletone deposited with the registrar (a) the duplicate certificate of title No. 113983, which appellants had "*intrusted* to Napletone", and (b) a warranty deed dated *May 18, 1926*, purporting to be from appellants to Napletone covering the real estate in controversy.

(2) That the pretended deed was filed for record in the registrar's office on *May 19, 1926;* and

(3) That a certificate of title showing title to said premises in Napletone was *duly issued* by said registrar of titles on *May 19, 1926*, as certificate No. 167191. R. 3.

Appellants allege that their signatures had been forged to the deed that purported to convey the real estate to Napletone and to the assignment of the contract to sell to the Kennedys.

Appellants then allege that on *May 29, 1926*, there was filed for record in the office of the registrar of titles a deed dated *May 24, 1926*, to the real etsate in controversy, which appeared to have been executed and acknowledged by the said Napletone and which conveyed the premises to appellees, the Wilborns. Appellants further allege that Napletone also assigned and delivered to the Wilborns the duplicate original of appellants' contract of

sale with the Kennedys. It is further alleged that the other original of the contract was held by the Noel State Bank for the purpose of collecting the periodical installments of the purchase price payable thereunder.

Petitioners further allege "that they have made application to Joseph F. Haas, the registrar of title of Cook County, Illinois, requesting him to cancel and remove from his records the entries showing the two deeds hereinabove described and set forth, and that the certificates issued to the said Jerome C. Napletone to the said Charles Wilborn and Carrie S. Wilborn be by him ordered delivered up and cancelled, and *that a certificate be issued to your petitioners* correctly setting forth the title to said premises in your petitioners, but that the registrar has refused so to do."

Petitioners then say that, inasmuch as they are without remedy "save in a court of equity and *this proceeding*", they pray:

> "(1) That this court may decree the said purported two warranty deeds and the said purported assignments of contract hereinabove set forth, and each of them, be null, void and of no effect upon the title to said premises, or the interest of your petitioners thereto;
>
> (2) That the said registrar of titles may be ordered and directed by decree of this court to cancel and annul said certificates No. 167191 and 175048, and each of them, and that the same may be expunged and cancelled upon the records of said registrar of titles;
>
> * * * * *
>
> (3) That this court may enter an order and decree *finding* the *title* to the premises aforesaid now vested in your petitioners, Edward Eliason and Elin Eliason, his wife, as joint tenants, *free and clear of all liens and encumbrances,* except such as appear upon the certificate numbered 113893, heretofore is-

sued to your petitioners, and subject only to said first mortgage for Twenty-seven Hundred Dollars ($2700), and the rights of the said George B. Kennedy and Pearl A. Kennedy, his wife, as purchasers under said contract of sale, and parties in possession."

Was it the theory of appellants' petition that the Illinois Land Title Registration Act was void because in conflict with constitutional limitations? Not at all. *Appellants invoked this act and asked for the protection of alleged rights acquired thereunder and from no other source.* And this, too, by means of a petition filed "in the proceeding in which the land was registered", originally,—a remedy that the act itself and only the act authorizes.

It is significant that the petition filed purports to be a petition to control the actions of the registrar of titles of Cook County, but *the registrar of titles was not served with summons.* Demurrers of other defendants to the petition were sustained in the circuit court of Cook County (R. 10-14) and the action of the circuit court was affirmed by the Supreme Court of Illinois. R. 26.

It is also significant that though this proceeding is one to control the action of the registrar of titles, there is no allegation of fraud on his part or that he did not proceed strictly in accordance with the provisions of the statute relating to transfers by deed. It must be assumed therefore that the registrar did his duty and compared the signatures on the deed with the genuine signatures on file in his office, as required by Section 37, and that by a proper inquiry he ascertained that the transferror, Napletone, had the title proposed to be transferred and was entitled to make the conveyance, as provided in section 47.

It is also significant that there is no attack in the petition on the good faith of the Wilborns. Their rights can be dealt with only on the basis that *they are purchasers for value without notice.* The farthest that appellants go is the manifestly irrelevant allegation "that prior to the issuance" of the certificate of title to them the Wilborns had knowledge of appellants' claim. (R. 14.) The title was registered in Napletone *May 19, 1926,* (R. 3,) which was prior to Napletone's deed to the Wilborns. (R. 4.) Appellants themselves discovered nothing until *June 19, 1926.* Their notice to the registrar was after that date. (R. 3.) All the documents delivered to the Wilborns by Napletone were regular on their face. (R. 3.) They had been acknowledged before a notary and they passed muster at the registrar's office where the Wilborns' signatures were on file, as required by section 37 of the act.

The allegation in the petition that the premises in question "were duly registered" and that "a certificate numbered 113893, registering the title to said premises in your petitioners, was duly issued", is equivalent to saying that appellants have entered into "an agreement which shall run with the land, that the same shall be subject to the terms of the act and all amendments and alterations thereof", as provided in section 46. (Appendix, p. 67, *infra.*) This agreement includes the provisions of the act making the registration by the registrar of titles (sec. 49) and not the delivery of a deed by the grantor (sec. 54) the essential element in a transfer of title.

Appellants contend that they want this property *in specie* and not its value in money. They ask this court to declare unconstitutional *a statute that has been in force in Illinois for 33 years and under which more than*

a billion dollars worth of real estate has been registered because they must accept the money equivalent of their land in place of their land. Their petition shows they had bargained to sell this land to the Kennedys and that they were selling their equity in it when they "intrusted" their duplicate certificate to Napletone. It is evident they do not want the property itself. What then do they want? Surely they do not desire to destroy this workable, valuable, established system of title registration when it will gain them nothing. If they do so desire, this court will not set up a straw man to knock it down. They will lose nothing by Napletone's fraud if they are not a party to it. How can they be deprived of property in view of the facts?

Appellants, by their petition, protest against appellees' certificate being "free and clear" of all liens, encumbrances and charges except those noted thereon, but *they ask the circuit court to enter a decree finding title in them* "free and clear of all liens and encumbrances, except such as appear from the certificate No. 113893 heretofore issued to your petitioners," subject to the mortgage and contract of sale. They ask for the benefits of the act but do not want to accept its burdens.

The fact is that Napletone would have been powerless to harm appellants or to deceive anyone else if appellants had not "intrusted" to him their duplicate certificate of title and the duplicate original of the contract between appellants and the Kennedys. Appellants are the victims of their own misplaced confidence in Napletone. Why should anyone else, especially innocent purchasers for value, pay the price of appellants' gullibility?

ANALYSIS OF ILLINOIS LAND TITLE ACT.

We have set forth in an appendix to this brief the pertinent sections of the Illinois Land Title Registration Act in full and have indicated the subject matter of the other sections for the convenience of the court. The act, as now in force, will be found published as paragraphs 45-152 of chapter 30, Smith's Illinois Statutes, as paragraphs 49-157 of chapter 30 of Cahill's Illinois Statutes, and at pages 1809-1841 of volume 2, Callaghan's Illinois Statutes Annotated.

The present act is the Act of May 1, 1897, which was passed as an emergency measure immediately after the Supreme Court of Illinois had held the first act unconstitutional. The act was thereafter adopted by the people of Cook County in accordance with section 110.

However, the adoption of the act by the people of Cook County does not automatically bring any land under the act. The owner of any estate or interest in land desiring to have his title registered under the act must apply to a court having chancery jurisdiction in the county in which the land is situated. (Secs. 7-15.) The act provides ample means for bringing in all persons claiming any estate or interest in the land, whether known or unknown, and the court is given full power to determine the estates or interests of all concerned. (Secs. 7-25.) No mortgage, lien, charge, or lesser estate than a fee simple, is registerable, unless the fee simple to the same land is first registered. Sec. 8.

The act provides that the order or decree made or entered by the court shall be binding upon all parties to the proceeding. An appeal is allowed upon like terms as in other cases in chancery and a writ of error may

be sued out of the Supreme Court within two years after the entry of the order, but not afterwards. Provision is also made for opening up the decree in behalf of any person having an estate or interest in the land who was not properly brought into court. (Sec. 26.) A limitation of two years is also placed upon actions or suits for the recovery of lands, etc. by persons who have not been concluded by the order or decree because of some irregularity, insufficiency or some other cause. Sec. 27.

After the court enters its order or decree the county recorder of deeds, who is ex-officio registrar of titles (sec. 1), registers the title as found by the court. (Sec. 29.) The act provides that the registrar of titles shall "at the same time that he makes out his original certificate of title, make out an exact duplicate thereof, with the memorials and notations thereunder noted, which shall be delivered to the owner and shall be known as the owner's duplicate." (Sec. 36.) The registrar is required to take from the owner his receipt for the owner's duplicate certificate of title signed by him in person for the purpose of preserving evidence of the handwriting of the owner in his office, and this receipt is made *prima facie* evidence of the genuineness of the owner's signature. Sec. 37.

The certificate of title and the owner's duplicate certificate is made *prima facie* evidence in all courts and places that the provisions of law have been complied with and that the title to the land is as therein stated pending the time fixed for attack, and is made conclusive evidence of such facts after the expiration of such time. Sec. 39.

Section 40 of the act, which is set forth in full in the appendix (p. 65, *infra*,) provides that "the registered owner of any estate or interest in land brought

under this act shall, * * * except in cases of fraud to which he is a party, or of the person through whom the claims without valuable consideration paid in good faith, hold the same subject to" certain charges which are not here involved. This is the principal section involved in this suit.

Section 42 of the act provides in effect that a person taking a transfer of registered title can rely upon the certificate and is not required to make inquiry of others concerning any unregistered interest.

A registered owner of land desiring to transfer his title "may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferor has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him," the registrar shall register the title in the new owner. A new duplicate certificate of title is issued to the transferee and the old duplicate certificate theretofore surrendered is stamped "cancelled." Sec. 47.

A deed purporting to convey registered land "shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, * * * upon compliance with the terms of this act." (Sec. 54.) Other provisions of the act necessarily deal with transfers by the registrar, without a deed from the registered owner, as in the case of transfer to the heirs or devisees upon the death of the owner, (secs. 70-72).

Ample provision is made for the protection of owners in the case of the loss of duplicate certificates, (sec. 58,) and an escrow department is provided to facilitate transfers and to protect all parties pending the completion of the transaction affecting lands subject to the act. Sec. 3.

Section 93 and 94 (appendix, p. 69, *infra*) provides for appropriate proceedings in chancery where for any reason the registrar is without authority to make a particular transfer, or where he fails or refuses to make a transfer requested, or where it is desired to review his conduct with respect to the title to registered land. This proceeding is brought under these sections.

Needless to say, the Illinois Torrens Act has been the subject of attack on numerous occasions and upon almost every conceivable ground. It has withstood these attacks, as we have shown, and as a result of the decisions of the Supreme Court of Illinois it is now a valuable workable piece of legislation.

HISTORY OF LAND TITLE REGISTRATION ACTS.

Land title registration acts are commonly called Torrens acts because they are patterned after the Real Property Act adopted by the South Australian Legislature in 1858 at the instance of Sir Robert Torrens, then Registrar-General of Deeds in South Australia. (16 Encyc. Brit.—13th ed.—165; 27 id. 60.) Torrens had previously been Collector of Customs at Port Adelaide, and he subsequently stated in an essay that he had taken the Shipping Acts for his model and that he had intended to adopt the principle of conveyance by entry in a public office. Thom Canadian Torrens System, p. 9.

This system of registering land titles, instead of recording mere evidences of title, has found favor with English speaking people everywhere. Land title registration statutes have been adopted by most of the legislative units of the British Empire, including England, Ireland, New Zealand, the Australian colonies, most of the provinces of Canada, and many of the Crown colonies. These various statutes are set out in full in Hogg on Registration of Titles to Land Throughout the Empire. These statutes differ in detail, but fundamentally they are identical in purpose and general effect.

In the United States, land title registration acts are in force in the following states and territories, the original acts being found as indicated:

California—Statutes 1897, pp. 138-167.
Colorado—Laws 1903, pp. 311-352.
Georgia—Acts of 1917, pp. 108 *et seq.*
Illinois—Laws 1897, pp. 141-165.
Massachusetts—Acts 1898, pp. 682-722.
Minnesota—Laws 1901, pp. 348-378.
New Mexico—Laws 1913, pp. 158-175.
New York—Laws 1908, pp. 1247-1283.
Nebraska—Laws 1915, pp. 494-526.
North Carolina—Acts 1913, pp. 147-159.
Ohio—Laws 1913, pp. 914-960.
Oregon—Laws 1901, pp. 438-467.
South Carolina—Acts 1916, pp. 942 *et seq.*
Virginia—Acts 1916, pp. 70 *et seq.*
Washington—Laws 1907, pp. 693-738.
Utah—Laws 1917, chap. 28.
Hawaii—Laws 1903, chap. 56.
Philippines—Acts Philippine Com. 1904, p. 151.

The earliest land title registration act in the United States was passed in Illinois in 1895, but was declared unconstitutional on the ground that it delegated judicial powers to the registrar of titles. (*People* v. *Chase*, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105.) The second land

title registration act was passed in Ohio in 1896 and it was held unconstitutional on several grounds. *State* v. *Guilbert*, 56 Ohio St. 575, 38 L. R. A. 519.

The present Illinois land title registration act has been repeatedly attacked and as often sustained. The first and leading case dealing with the constitutional objections made to the present statute is *People* v. *Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801. Other cases sustaining the act are *Waugh* v. *Glos*, 246 Ill. 604, 92 N. E. 974; *Mihalik* v. *Glos*, 247 Ill. 597; *Culver* v. *Waters*, 248 Ill. 163, 93 N. E. 747; *Eliason* v. *Wilborn*, 335 Ill. 352, 167 N. E. 101.

Decisions of other jurisdictions sustaining land title registration acts, in principle the same as the Illinois act, are:

Tyler v. *Judges of Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, (writ of error dismissed for want of jurisdiction, 179 U. S. 405);

City of New York v. *Wright*, 243 N. Y. 80, 152 N. E. 472;

Ashton-Jenkins Co. v. *Bramel*, 56 Utah 587, 11 A. L. R. 752;

Crowell v. *Akin*, 152 Ga. 126, 19 A. L. R. 51;

Peters v. *Duluth*, 119 Minn. 96, 41 L. R. A. (N. S.) 1044;

Douglas v. *Westfall*, 85 Minn. 437, 57 L. R. A. 297;

People v. *Crissman*, 41 Col. 450, 92 Pac. 949;

White v. *Ainsworth*, 62 Col. 513, 163 Pac. 959;

Robinson v. *Kerrigan*, 151 Cal. 40, 90 Pac. 129;

Drake v. *Frazer*, 105 Neb. 162, 11 A. L. R. 753.

Since the Act of July 1, 1902, known as the Philippine Bill, contains a due process of law clause similar to that found in the Fourteenth Amendment to the Federal Constitution, the following cases arising under the Philippine Land Title Registration Act are pertinent:

Alba v. *De la Cruz*, 17 Philippine, 49;

Jose y Narvaez v. *Commander*, 16 Philippine, 62.

This court has had occasion to pass upon questions arising under the Philippine Act and, while it has not discussed the due process clause of the Philippine Bill, the court has treated the act as valid legislation.

Carino v. *Insula Government*, 212 U. S. 449;

Jover y Costas v. *Insular Government*, 221 U. S. 623;

Tiglao v. *Insular Government*, 215 U. S. 410.

This court has also had occasion to consider a case arising under the Land Title Registration Act of Hawaii.

Lewers & Cook, Ltd. v. *Atcherly*, 222 U. S. 285.

Although the fundamental idea of land title registration acts is of ancient origin and is by no means unknown to the common law, its adoption involved change and affected interests that profited by the existing wasteful practice of recording mere evidences of title. There was strong opposition by abstractors, title insurance companies, and others who felt that this common-sense system of registering title to land would interfere with their business. In spite of this opposition, the system grew in favor and finally received the approval of the American Bar Association. (38 A. B. A. Reports, pp. 1055 *et seq.*; 40 id. p. 929.) The Commissioners on Uniform State Laws have adopted a uniform land registration

act which has been accepted by Utah and Virginia. 9 Uniform Laws Ann. pp. 146 *et seq.*

The general purpose of the Torrens system of registration of land titles has been variously stated by courts and other authorities to be to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain by an inspection of the register who may convey the title to him, (*Glos* v. *Kingman & Co.* 207 Ill. 26); to create an independent system of registration of land titles so that all instruments intended for the purpose of passing or affecting any title to real estate registered thereunder should be filed and registered in the office of the registrar and at no other place, (*Hacken* v. *Isenberg,* 288 Ill. 589); to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested, (*Robinson* v. *Kerrigan,* 151 Cal. 40); to establish a method by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official made by law conclusive in that regard, (3 Tiffany on Real Property,—2nd ed.—2273); to establish a system of registration of transactions with respect to interests in land, the declared object of which is under governmental authority to establish and certify to the ownership of an absolute and indefeasible title to such land and to simplify its transfer, (Hogg's Australian Torrens System, p. 1; Niblack's Analysis of The Torrens System, sec. 8); and to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested. The basic principle of the system is the registration of the title to the land instead of registering, as under the old system, the evidence of such title. *Kemler Lumber Co.* v. *Naumann,* 301 Ill. 484.

The method used in the United States to further the object and purpose of land title registration, as described in the preceding paragraph, is a judicial proceeding. It is now clearly established by the great weight of authority that a land title registration proceeding is an action *in rem* and not *in personam*.

Tyler v. *Judges of Court of Registration*, 175 Mass. 71;

Douglas v. *Westfall*, 85 Minn. 437;

Drake v. *Fraser*, 105 Neb. 162;

Stewart v. *Kellough*, 104 Ohio St. 347.

An applicant for initial registration must establish title in himself as against the whole world before the court will enter an order directing his title to be registered. The proceeding is not a substitute for a bill in equity to remove a cloud from title, but is one which authorizes initial registration of a title only when it is good against everyone.

Teninga v. *Glos*, 266 Ill. 94;

Waugh v. *Glos*, 246 Ill. 604;

Brooke v. *Glos*, 243 Ill. 392;

Glos v. *Kingman & Co.* 207 Ill. 26.

In his Australian Torrens System, (pp. 21-22,) Hogg says:

> "The introduction of the system into South Australia was strongly opposed by lawyers of every class, from solicitors to judges, and no harder things have been said of the Torrens system generally than have been said of the South Australian Statutes in South Australia. It will probably be conceded that the English Act of 1862 was better drafted and more scientifically modelled in accordance with English

real property law. Nevertheless in New Zealand the Land Registry Act of 1860, after a trial of ten years, and in Victoria and New South Wales Bills on the same lines, were all abandoned in favor of measures based on Sir Robert Torrens' Statutes, and the Australian system has been as successful in obtaining the approval of the public as the English system has been unsuccessful. One explanation, or a partial explanation of this, seems to be that the English Acts have, by that very adherence to the forms and principles of English land law and conveyancing in which Sir Robert Torrens' Act was strikingly deficient, failed to remedy the evils incidental to the existence of the equitable estate. The South Australian Statutes grappled with these evils—certainly rather from the point of view of a layman than a lawyer—with great boldness, and at the cost of neglecting the feudal rules which underlie real property law; but the result has been the nearest approach yet made in form to allodial ownership under purely English Law."

In 54 Central Law Journal, (p. 285,) is an interesting article on the Torrens system. In the course of the article the author calls attention to the fact that Sir Robert Torrens "little knew, we may assume, the immeasurable distance which the common law had placed between rights of ownership of real estate and of personal property. He never dreamed that, out of the dead past, the ghostly hand of the 'unknown claimant,' the 'party entitled to notice,' the 'person under disability,' the 'absent defendant,' and other well known spooks clad in the dignity of judicial decisions of many generations, is held able to stretch out and fasten upon real property as distinguished from personalty." Nor, we may add, did he foresee the narrow path the system would have to tread through the many and various limitations of American constitutions before it could establish itself upon the legislative units of the United States. Thus far, however, the courts have held that it has been suffi-

ciently adaptable to conform with American constitutional government, and the attacks that have been made upon it have demonstrated its strength and worth.

POINTS PRESENTED FOR DECISION.

Appellants did not present for decision to the circuit court of Cook County or to the Supreme Court of Illinois the question they undertake to present to this court. In the state courts appellants contended:

(1) That sections 40 and 42 of the Illinois Land Title Registration Act do not by their terms include registered titles based upon forged instruments and that there is no provision in said act covering such titles; and

(2) If sections 40 and 42 of said act be held to cover, by their terms, registered titles based upon forged instruments, said sections 40 and 42 are unconstitutional and prohibited by the *Fifth* Amendment to the Federal Constitution, and section 2 of article II. of the Constitution of Illinois. Appendix, p. 72, *infra.*

Appellants admit that the Fourteenth Amendment to the Federal Constitution was not even mentioned in their original brief in the Supreme Court of Illinois. (Statement as to jurisdiction, p. 2; brief of appellants, p. 2.) By this admission they admit that the question which they contend gives this court jurisdiction of this appeal was not a question presented to the Supreme Court of Illinois. Rule 15 of the Rules of Practice of that court requires each party to file a printed brief, and as to appellants' brief says: "No alleged error or point not contained in such brief shall be raised afterwards, either by reply brief or in oral or printed argument, or on petition for rehearing." Appendix, p. 72, *infra;* 319 Ill. 16.

In *Bowe* v. *Scott*, 233 U. S. 658, this court held:

> "A mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition, considers and passes upon the Federal ground therein relied upon."

SUMMARY OF THE ARGUMENT.

I.

Appellees respectfully submit that this appeal must be dismissed. There is no Federal question presented on this record which gives this court jurisdiction. Appellants did not invoke the Fourteenth Amendment to the Federal Constitution in the circuit court of Cook County nor in the Supreme Court of Illinois, and cannot challenge the validity of the Illinois statute in the first instance in this court on the ground that it contravenes the Fourteenth Amendment. Furthermore, the judgment of the Supreme Court of Illinois is based on grounds which do not involve the decision of a Federal question, and so no Federal question is presented for review. (pp. 26-27, *infra.*)

II.

Appellees respectfully submit that appellants are estopped to challenge the validity of the Illinois Land Title Registration Act and that the judgment of the Supreme Court of Illinois must for that reason be affirmed. Appellants voluntarily accepted the benefits of this elective statute and cannot now challenge its validity. By their petition in the circuit court of Cook County they invoked the provisions of the statute in their behalf and will not in a court of review be heard to question its constitutionality. Furthermore, appellants suffered their loss because of their own negligence and not because of any provision of the statute. This court will not examine the statute to see if some other owner, under different circumstances, might be injured by it. (pp. 28-34, *infra.*)

III.

The Land Title Registration Act of Illinois does not contravene the Fourteenth Amendment to the Constitution of the United States, but it affords to the owner of registered land due process of law and equal protection of the law. Land title registration acts are now, and in principle have been for centuries, in effect all over the world, and authority to enact such legislation has always been recognized. The demand for a simpler, quicker, cheaper and safer method of transferring title to land justified the adoption of the Torrens system in Illinois. (pp. 35-61, *infra*.)

ARGUMENT.

I.

THERE IS NO QUESTION PRESENTED ON THIS RECORD WHICH GIVES THIS COURT JURISDICTION AND SO THIS APPEAL MUST BE DISMISSED.

A.

Appellant Did Not Invoke the Fourteenth Amendment to the Federal Constitution in the Circuit Court of Cook County Nor in the Supreme Court of Illinois and Cannot Challenge the Validity of the Illinois Statute in the First Instance in This Court on the Ground That It Contravenes the Fourteenth Amendment.

The Fourteenth Amendment to the Federal Constitution is nowhere mentioned in the opinion of the Supreme Court of Illinois. There was nothing *inadvertent* about the mention of the *Fifth* Amendment and the omission to mention the *Fourteenth* Amendment. It was an exact statement of the fact. Appellants had not mentioned the Fourteenth Amendment in their principal brief filed in the Supreme Court of Illinois.

Counsel admit this fact, but they say that the Fourteenth Amendment was invoked in their reply brief and in their petition for rehearing. The fact that a rehearing was granted and that the court upon a reconsideration of the case adhered to its original opinion (R. 17) emphasizes the fact that the Supreme Court of Illinois refused to consider the contention that the act contravened the Fourteenth Amendment to the Federal Constitution for the reason that its Rule 15 provides that no point made for the first time in a reply brief or in a petition for rehearing will be considered.

In refusing to pass upon the point made by appellants *as an afterthought,* the Supreme Court of Illinois followed a long-established practice. By a long line of decisions, of which we cite only a few, the following rules are thoroughly established:

(1) Points relied upon for reversal must be raised in the appellant's original brief and argument to enable opposing counsel to be heard thereon and cannot be considered when raised for the first time in the reply brief.

Indiana Insurance Co. v. *People,* 170 Ill. 474;

Harrow v. *Grogan,* 219 Ill. 288;

Pirola v. *Turner Co.* 238 Ill. 210.

(2) Points raised for the first time in a petition for rehearing will be disregarded.

Ellis v. *Sisson,* 96 Ill. 105, 124;

Matthews v. *Granger,* 196 Ill. 164, 170;

Arkley v. *Niblack,* 272 Ill. 356;

Scott v. *Scott,* 307 Ill. 586.

Appellants, in their principal brief in the Supreme Court of Illinois, argued that the Illinois Land Title Registration Act, if construed as it has been construed by the Supreme Court of Illinois, violated the *Fifth* Amendment to the Federal Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law. R. 22; appendix, p. 72, *infra.*

> "It has been so frequently held, as not to warrant a citation of many authorities, that the first ten amendments to the Federal Constitution operate on the national government only, and were not intended to, and did not, limit the powers of the states in respect to their own people. (*Spies* v. *Illinois,* 123 U. S. 131; *Brown* v. *New Jersey,* 175 U. S. 172.) That

portion of the Fifth Amendment already cited, therefore, has no application in a proceeding like this, in a state court, under a state statute."

Jack v. *Kansas,* 199 U. S. 372.

The *only constitutional* question properly presented by the appellants to the Supreme Court of Illinois was that the Illinois Land Title Registration Act contravenes section 2 of article II. of the Constitution of Illinois.

In such a case the rule is as held by this court in *Bowe* v. *Scott,* 233 U. S. 658:

> "Where the state Constitution contains a due process of law clause, an averment that contemplated action of a municipality would deprive complainant of his property without due process of law, without making reference to the Constitution of the United States or asserting express rights thereunder, is referable to the state Constitution alone and affords no basis for invoking the jurisdiction of this court under section 237, Judicial Code."

The construction given the statute in question by the Supreme Court of Illinois is binding upon this court. This includes not only what the act means but that it does not violate the state Constitution.

Barbee v. *Chelan Electric Co.* decided Nov. 25, 1929, by this Court (Co-op. Adv. Sheet, 1929 Term, p. 90).

Bachtel v. *Wilson,* 204 U. S. 36;

Smiley v. *Kansas,* 196 U. S. 447.

This court's review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. Where the only Federal question presented is whether the state statute violates the *Fifth* Amendment to the Federal

Constitution, the question is patently frivolous and the appeal should be dismissed.

Silver v. *Silver*, decided Nov. 25, 1929, by this Court (Co-op. Adv. Sheets, 1929 Term, p. 67).

B.

The Judgment of the Supreme Court of Illinois Is Based on Grounds Which Do Not Involve the Decision of a Federal Question and So No Federal Question Is Presented for Review. (R. 22.)

The Supreme Court of Illinois held that appellants were estopped to question the constitutionality of the Illinois Land Title Registration Act because they had accepted the benefits of the act and had invoked the provisions of the act by filing their petition under it. (R. 22.) The court also held that "appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute." R. 25.

A case precisely in point is *Pierce* v. *Somerset Railway*, 171 U. S. 641, where this court, on page 648, said:

> "It is thus seen that there were two questions determined by the state court. One related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that they did not impair the obligation of the contract contained in the mortgage. That is a Federal question. The other related to the defense of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such a case a writ of error to the state court cannot be sustained. *Eustis* v. *Bolles*, 150 U. S. 361; *Rutland Railroad* v. *Central Vermont Railroad*, 159 U. S. 630; *Seneca Nation* v. *Christy*, 162 U. S. 283.

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one.

"In the above case of *Eustis* v. *Bolles*, 150 U. S. 361, 368, the state court held that by accepting his dividend under the insolvency proceedings Eustis waived his legal right to claim that the discharge obtained under the subsequent laws impaired the obligation of a contract. This court held that whether that view of the case was sound or not, it was not a Federal question, and therefore not within the province of this court to inquire about.

* * * * *

"In *Seneca Nation* v. *Christy*, 162 U. S. 283, it was held by the state court that even if there were a right of recovery on the part of the plaintiffs in error because the grant of 1826 was in contravention of the Constitution of the United States (which the court held was not the case), yet that such recovery was barred by the New York statute of limitations. This court held that as the judgment of the state court could be maintained upon the latter ground, it was without juirsdiction because the decision of the state court upon that ground involved no Federal question.

"In this case there being two distinct grounds upon which the judgment of the state court was based, each of which is sufficient, and one of which involves no Federal question, we must, upon the authority of the cases above cited, hold that this court is without jurisdiction, and the writ of error must be

Dismissed."

See also *McCoy* v. *Shaw*, 277 U. S. 302.

II.

APPELLANTS ARE ESTOPPED TO CHALLENGE THE VALIDITY OF THE ILLINOIS STATUTE AND SO THE JUDGMENT MUST BE AFFIRMED.

C.

Appellants Accepted the Benefits of This Elective Statute and Cannot Now Challenge Its Validity.

Appellants acquired their title under the act, thereby saving the time and expense incident to private investigation of title. They held the land for a number of years and when they entered into a contract to sell it they agreed to give a Torrens certificate of title to the purchaser. (R. 10.) The Supreme Court of Illinois held that appellants were bound by the covenant that ran with the land, as provided in section 46 of the act. (R. 22-23.) It is clear that appellants elected to be bound by the act and that they are bound by it. This court is bound by the holding of the Supreme Court of Illinois that appellants were bound by the covenant that ran with the land, since a construction of the act is involved.

In *Booth Fisheries Co.* v. *Industrial Com.* 271 U. S. 208, this court held:

> "The Wisconsin Workmen's Compensation Act, which makes the findings of fact of the Industrial Commission conclusive if there be any evidence to support them, does not thereby violate the rights of an employer under the Fourteenth Amendment by depriving him of a judicial review of the facts on which an award is made against him, because the act is elective and does not bind an employer who has not voluntarily accepted its provisions."
>
> "An employer who has made such election, ac-

cepting the burdens, is estopped from questioning its constitutionality."

In *Pierce Oil Corporation* v. *Phoenix Refining Co.* 259 U. S. 125, this court held:

"Action of a state requiring a foreign corporation to operate its local, private oil pipe line as a common carrier does not deprive it of property without due process of law when done pursuant to constitutional and statutory provisions in force when the corporation entered the state and by it accepted in applying for and obtaining the privilege of doing local business."

On page 128 the court said:

"When the large discretion which the State had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business is considered, (*National Council U. A. M.* v. *State Council,* 203 U. S. 151, 163; *Pullman Co.* v. *Kansas,* 216 U. S. 56, 66; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 83,) the contention that this order, of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law must be pronounced futile to the point almost of being frivolous. 'By accepting the privilege it voluntarily consented to be bound by the conditions attached to it (216 U. S. 56, 66), and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional. A claim so similar to the one we have here that the disposition of it should have been accepted as disposing of this case was dealt with by this court in the *Pipe Line* cases, 234 U. S. 548, 561, in a single sentence, saying: 'So far as the statute contemplates future pipe lines and prescribes conditions upon which they may be established, there can be no doubt that it is valid.'

"There is nothing in the nature of such a consti-

tutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. *Pierce* v. *Somerset Railway*, 171 U. S. 641, 648; *Wall* v. *Parrot Silver & Copper Co.* 244 U. S. 407, 411."

In *St. Louis Malleable Casting Co.* v. *Prendergast Construction Co.* 260 U. S. 469, this court held:

"An owner of property within a special sewer district, who connected his premises with the sewer when constructed and availed himself of its benefits, is estopped from maintaining a suit in which, upon the ground that the manner of constituting the district and apportioning the cost infringed his rights under the Fourteenth Amendment, he seeks to cancel the tax bill issued to the contractor against his property."

In *Grand Rapids and Indiana Railway Co.* v. *Osborn*, 193 U. S. 17, this court held:

"Purchasers of a railroad, not having any right to demand to be incorporated under the laws of a state, but voluntarily accepting the privileges and benefits of an incorporation law, are bound by the provisions of existing laws regulating rates of fare and are, as well as the corporation formed, estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporation."

See also:

Scholey v. *Rew*, 23 Wall. 331;

Palumbo v. *George A. Fuller Co.* 99 Conn. 353, 122 Atl. 63.

If we are correct in our contention that appellants have, by accepting the benefits of this elective act, waived their right to challenge its validity, then the judgment of the Supreme Court of Illinois should be affirmed.

D.

By Their Petition in the Circuit Court, Appellants Invoked the Provisions of the Statute and Will Not Now Be Heard to Question Its Validity.

We have set forth in our statement the allegations of the petition filed by appellants pursuant to sections 93 and 94 of the act in question. By this proceeding the appellants asked the circuit court of Cook County to coerce the registrar of titles to do what they asserted it was his duty to do under the Illinois Land Title Registration Act. That a litigant cannot institute proceedings under a statute and subsequently assert that it is invalid is well settled by the decisions of this court.

In *Wall* v. *Parrot Silver & Copper Co.* 244 U. S. 407, the appellants filed a bill in the United States District Court of Montana, "seeking to avoid an executed sale of all the property and assets of" the Parrot Silver & Copper Company to the Anaconda Copper Mining Company had pursuant to certain statutes. It was claimed that these statutes of Montana which authorized a sale of all the property of a corporation upon a vote of at least two-thirds of all the shares of the capital stock outstanding, were unconstitutional, and that if enforced appellants' property would be taken without due process of law, etc. A fraudulent scheme was also alleged. However, the statutes complained of also provided that any stockholder not satisfied with the award of appraisers appointed thereunder might appeal to the (State) District Court, where the value of the stock should be reassessed by a jury as in "appeals from the assessment of commissioners in condemnation proceedings provided by law." It appeared that "after the sale to the Ana-

conda Company complained of, the appellants served a notice of dissent on the Parrot corporation and commenced a statutory proceeding for the appraisal of their stock, which has not been brought on for hearing but is still pending."

Concerning the contentions of appellants that the statutes were unconstitutional, this court said:

> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other states and of a seemingly equitable character, for the reason that the appellants by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them. (*Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581; *Electric Co.* v. *Dow*, 166 U. S. 489; *Pierce* v. *Somerset Railway*, 171 U. S. 641; *Leonard* v. *Vicksburg, Shreveport & Pacific R. R. Co.* 198 U. S. 416, 422.) They cannot claim the benefit of statutes and afterwards successfully assert their invalidity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be."

See also:

United Fuel Gas Co. v. *Railroad Com.* 278 U. S. 300;

Hurley v. *Commission of Fisheries of Virginia*, 257 U. S. 223;

Chicago-Sandoval Coal Co. v. *Industrial Com.* 301 Ill. 389;

Shoal Creek Coal Co. v. *Industrial Com.* 300 Ill. 551.

In *Lewis* v. *Chamberlain*, 69 Ore. 476, 139 Pac. 571, a case that arose under the Oregon Torrens act, the court said:

"The parties to this suit, having invoked the pro-

visions of the registration law, cannot now be heard to say that it is unconstitutional."

If this point made by us is well taken, the judgment of the Supreme Court must be affirmed.

E.

Appellants Suffered Their Loss Because of Their Own Negligence and Not Because of Any Provision of the Statute. This Court Will Not Examine the Statute to See If Some Other Owner, Under Different Circumstances, Might Be Injured By It.

In its opinion the Supreme Court of Illinois stated one of its grounds of decision thus:

> "After the title was registered in appellants it could not be registered in Napletone until the duplicate certificate to appellants was surrendered to the registrar. If section 47 had been complied with, it would have been impossible for Napletone to have accomplished this fraud. The act erected a safeguard against a forged transfer being registered by the requirement that no transfer should be registered unless the owner's certificate was produced along with the instrument of transfer." R. 23.

And again:

> "Appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute." R. 25.

In other words, the court holds that appellants are estopped to complain of their loss, if any, because they themselves intrusted Napletone with their duplicate certificate of title and with the duplicate original of their contract with the Kennedys. They cannot complain because of the principle that where one of two innocent persons must suffer by the fraud of a third person, he

who put it in the power of the third person to perpetrate the fraud must bear the loss.

Since this non-Federal ground of estoppel amply sustains the judgment of the Supreme Court of Illinois, this court should affirm that judgment.

The principle relied on by us is well stated in *Eustis* v. *Bolles,* 150 U. S. 361, at 366, as follows:

> "It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

The principle has been applied in scores of decisions. We cite only a few of them.

Harrison v. *Morton,* 171 U. S. 38;

Capital National Bank v. *First National Bank,* 172 U. S. 425;

McQuade v. *Trenton,* 172 U. S. 636.

If this point is sustained, there is no occasion for investigating the constitutional question because the state courts were right in denying equitable relief to one who had suffered a loss by his own negligence and not by reason of any provision of the act.

III.

THE LAND TITLE REGISTRATION ACT OF ILLINOIS DOES NOT CONTRAVENE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

F.

The Demand for a Simpler, Quicker, Cheaper and Safer Method of Transferring Title to Land Justified the Enactment of the Land Title Registration Act in Illinois. It Affords the Owner of Registered Land Due Process of Law.

Even if we assume in this division of the argument,

(a) That appellants predicated their right to relief in the state courts on the due process clause of the Fourteenth Amendment;

(b) That the state Supreme Court based its judgment solely upon the ground that the Illinois act did not deprive appellants of their property without due process of law; and

(c) That neither the filing of the petition under sections 93 and 94 of the Illinois statute, nor the purchase of land subject to it, estops the appellants from attacking it here;

yet the judgment of the Supreme Court of Illinois must be affirmed for the reason that the Illinois statute afforded appellants due process of law.

Before proceeding with this division of the argument, we must first determine its *scope*, which depends upon the parts of the act that may legitimately be attacked by the appellants in view of the assumptions above stated. Manifestly, they cannot attack that part of the

act that relates to *initial* registration of title to land because they do not belong to the class that is affected by it. They expressly allege in their petition that initial registration of the land in controversy was duly and regularly accomplished upon the application of other persons, that thereafter, "by mesne and sundry conveyances", the title to said land became vested in appellants, and that a duplicate certificate of title was duly and regularly issued to them by the registrar of titles, all, of course, as provided by the act. R. 1-2.

It is obvious that appellants claim under the original decree of registration, which depends, *solely* and *exclusively,* upon the Illinois Land Title Registration Act. It necessarily follows, therefore, that appellants' attack must be limited to those parts of the act that prescribe (1) by what means registered lands may be conveyed, and (2) how title to them may otherwise be lost or acquired.

We must, therefore, make the following assumptions:

(1) That, in addition to the ordinary recording statutes that provide for the *recording* of mere *evidences* of title, the laws of Illinois provide for the *registration* of *title* to land, and that they are valid so far as *initial* registration is concerned; and

(2) That appellants *voluntarily* acquired an ordinary piece of land, title to which had been registered initially by other persons; that *title* to the land was duly and regularly registered in the appellants, and that a duplicate certificate of title was delivered to them as provided by law.

Now, having in mind (1) the foregoing necessary assumptions, (2) the pertinent provisions of the Torrens

Act, and (3) the facts alleged by appellants, let us put the *concrete question* that is presented in this case.

Were appellants deprived of their property without due process of law?

The fact that there existed in Illinois two different classes of land,—registered and unregistered,—not only justified, but required different legal rules concerning their transfer, the legal effect of transfers, etc. (*Evans* v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.) Manifestly, registered lands could not be conveyed or encumbered by private acts of the parties without reference to the public register. Initial registration would be of no practical benefit to anyone except the person who procured it, if registered land could be conveyed, encumbered, etc. like unregistered land. The relatively expensive slow process of initial registration could not be repeated every time there was a change of ownership.

The purpose of the General Assembly was to provide a safe, expeditious and inexpensive means of ascertaining with certainty the condition of the title to registered land at any given time, so that it might be transferred or otherwise dealt with in absolute assurance, safety and dispatch by all persons concerned. It therefore provided that title to registered land should be conveyed not by deed, but by registration of title in the office of the registrar of titles. There is nothing unconstitutional—to say nothing of adaptation to proposed ends or reasonableness—in that. From time immemorial, or at least since states have permitted their subjects to own or convey land, the laws have provided what was necessary to the transfer of title from one person to another. There is nothing unreasonable nor unconstitutional in making the registrar of titles the one whose duty it is to keep all records, to make all entries, to issue certificates of

title, to determine whether the transferor can legally convey the lands, to determine whether the proposed transfer conform with the law, etc.

Contrary to appellants' argument (Point A), a reading of the act shows:

(1) That provision is made for a hearing before the registrar [who is provided with examiners of title who must be attorneys at law (sec. 5),] whenever any transfer is to be made, and that the registrar is given undefined but nevertheless broad discretionary powers subject to proceedings for correction by the circuit court (secs. 93-95), as well as other remedies. Section 47 provides that it must be made apparent to the registrar that the transferor owns or has the right to convey and that the transferee has the right to have a conveyance; and

(2) That an owner is given ample means of protection and can always obtain a hearing by holding on to his duplicate certificate of title.

All that any owner has to do to obtain a hearing before the registrar is to retain possession of his duplicate certificate of title. There is nothing unusual in requiring the owner to hold on to his duplicate certificate of title, particularly when the act provides means for his protection if it should be lost (Sec. 58.) Owners of negotiable instruments and certificates of stock, which are transferable by mere delivery, must bear the same burden.

Appellants *voluntarily surrendered* their duplicate certificate of title to Napletone and, as we have seen, are responsible for their own loss. They suggest that they would be in the same position if their duplicate certificate

of title had been stolen. The answer to the suggestion is that it was not stolen and this court is not going to decide the validity of a state statute upon a hypothetical case.

In *Hibben* v. *Smith*, 191 U. S. 310, the court held:

> In the apportionment of assessments for improvements due process of law is afforded to the taxpayer if he is given an opportunity to be heard before the body making the assessment; and, so far as the Federal Constitution is concerned, the state legislature may provide that such hearing shall be conclusive.

On pages 321-2, the court said:

> "Although in imposing such assessments, the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power, and it is not necessary that in imposing an assessment there shall be a hearing before a court provided by the law in order to give validity to such assessment. Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned.

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 168, it was said that—

> 'Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may subsequently be charged in his property has had a hearing, or an opportunity for one provided by the statute.'

And it was also said in that case that whether a review is or is not given upon any of these questions of fact (that is, as to benefits and the amounts of the assessments), was a mere question of legislative discretion, so long as the tribunal created by the

state had power to decide them, and the opportunity for a hearing was given by the act, and that it was not constitutionally necessary in such case to give a rehearing or an appeal.

In *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, where the law provided for the fixing of water rates by a board of supervisors after a hearing, and without any right of review by any court, it was stated (at page 354) by Mr. Chief Justice Waite, giving the opinion of the court:

'Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule.' See *Spencer* v. *Merchant*, 125 U. S. 345."

See also:

Pittsburgh, etc. Railway v. *Board of Public Works*, 172 U. S. 32, 45;

Den v. *The Hoboken Land and Improvement Co.*, 18 How. 272, 280.

Laws relating to the transfer of land depend upon the police power of a state. The transfer and the security of titles to land vitally affect the public welfare. Opportunity for a hearing must be such as the particular case admits of or requires. Titles must be secure, and yet readily transferable. If the act had required the personal presence of an owner in the registrar's office whenever a transfer should be made, it would have been too rigorous. Modern business is more flexible than that. A hardship would have been imposed upon non-residents, aged, infirm, sick, temporarily absent, and other citizens. A broad discretion was given the registrar, and the owner was given ample means of protection, not only by providing that the surrender of his duplicate

certificate should be a condition precedent to the making of a transfer, but by providing ample indemnity in case he should be deprived of his property by reason of any mistake or fraud.

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."
>
> *United States* v. *Fox*, 94 U. S. 315;
>
> *Arndt* v. *Grigg*, 134 U. S. 316.

Appellants' Point B of argument is answered by calling attention to the fact that neither section 40 nor 42, nor any other section of the act, purports to take the property of one person and give it to another. The provision for paying indemnity to one who has suffered loss by reason of some provision of the act or some act or omission of the registrar is not a provision for compensation for property taken but a new remedy substituted for others taken away.

The Torrens system of land title registration is at one and the same time a system of conveyancing and a system of title assurance. In discussing the assurance or indemnity features of the Colorado Land Title Registration Act, the Supreme Court, in *White* v. *Ainsworth*, 62 Colo. 513, 163 Pac. 959, said:

> "We are unable to appreciate wherein these provisions make the state an insurer of title. The act provides a remedy for mistake committed by the governmental officers and also against other parties, but in such instance it only agrees to pay upon the

happening of any of the events mentioned in the sections, and then only out of a certain fund, which is created by a payment to the registrar by each person registering title to land. *It is not intended for the insurance of land titles nor as compensation for land taken without the owner's consent, but merely as a safeguard or protection to that extent in favor of anyone who might perchance be injured without other remedy by reason of the provisions of the act.* It is quite probable, although unnecessary to determine that the law could stand even though this indemnity fund were eliminated and no provisions made for any such suit by claimants of this kind." (Italics ours.)

See also in this connection:

Jones v. *York County,* 26 Fed. (2nd), 623;

Shevlin-Mathieu Lumber Co. v. *Fogarty,* 130 Minn. 456, 153 N. W. 871;

Ashton-Jenkins Co. v. *Bramel,* 56 Utah, 587, 11 A. L. R. 752.

In *Miedreich* v. *Lauenstein,* 232 U. S. 236, the court held:

(1) In the absence of fraud or collusion, where the original party did all that the law required in the issue and attempt to serve process, but the sheriff made a false return to the effect that service had been made, the state court, in the absence of direct attack upon the return, in acting thereon as though it were true, and holding that the sole remedy was an action against the sheriff for a false return, did not deny the party due process of law within the meaning of the Fourteenth Amendment.

(2) One damaged by reason of a false return of the sheriff as to service of process, and who is given a remedy against the sheriff, is not denied due process of law by the enforcement of the judgment based on such false return because the amount of the sheriff's bond is less than the amount of his loss.

On page 247 the court said:

> "In a case of this character the law must have in view, not only the rights of the defendant who has been a victim of a false return on the part of the sheriff, but of persons who have relied upon the regularity of the return of officials necessarily trusted by law with the responsibility of advising the court as to the performance of such duties as are here involved. Were the law otherwise, titles might be attacked many years after they were acquired, where the party had been guilty of no fraud and had acted upon the faith of judicial proceedings apparently perfect in every respect."

The foregoing argument will also suffice for that part of the act that provides that purchasers for value in good faith from a registered owner shall acquire a good title. It does not protect dishonest persons, and the true owner is given means of securing a hearing before the registrar by simply safely keeping his duplicate certificate of title, or of promptly notifying the registrar of its loss and taking the other steps provided by law. If the foregoing and other means of protection provided by the act are availed of, no owner's land can be transferred to another person without the owner's consent.

See Kerr's Australian Land Titles System, p. 165, *et seq.*

It is not only fair to all concerned, but essential to the system, that the public records shall be given full faith and credit, and that purchasers for value without notice from a registered owner shall be protected.

> "This is the distinctive feature, the vital principle of the Torrens system. It is the very essence of the plan. For the courts to refuse to recognize and enforce it would be to emasculate the law and, by construction, make it not the Torrens system of land

titles, but a mere change in the form of the record, a mere modification of the recording act."

Brace v. *Superior Land Co.*, 65 Wash. 681, 118 Pac. 910;

McMullen & Co. v. *Croft*, 96 Wash. 275, 164 Pac. 930.

There is certainly nothing arbitrary, or oppressive, or unjust, in the protection of purchasers for value without notice as against an owner to whom the law has afforded ample means of protecting himself. They are similarly protected under the ordinary recording acts. In fact, they are protected in numerous cases, because of compensating public benefit, where the true owner is without fault. As Salmond points out, there are exceptions to the rule, *Nemo plus juris ad alium transferre potest, quam ipse haberet.*

"These exceptions are of two kinds: (1) those due to the separation of ownership from possession. We have seen already that when the legal ownership is in one man and the equitable in another, the legal owner is a trustee for the equitable. He holds the property on behalf of that other, and not for himself; and the obligation of this trusteeship is an encumbrance upon his title. Yet he may, none the less, give an unencumbered title to a third person, provided that that person gives value for what he gets, and has at the time no knowledge of the existence of the trust. This rule is known as the equitable doctrine of purchase for value without notice. No man who ignorantly and honestly purchases a defective legal title can be affected by any adverse equitable title vested in any one else. To this extent a legal owner can transfer to another more than he has himself, notwithstanding the maxim, *Nemo dat qui non habet.*

"The second class of exceptions to the general principle includes the cases in which the possession of a thing is in one person and the ownership of it in another. Partly by the common law, and partly

by various modern statutes, the possessor is in certain cases enabled to give a good title to one who deals with him in good faith believing him to be the owner. The law allows men in these cases to act on the presumption that the possessor of a thing is the owner of it; and he who honestly acts on this presumption will acquire a valid title in all events. The most notable example is the case of negotiable instruments. The possessor of a bank-note may have no title to it; he may have found it or stolen it; but he can give a good title to any one who takes it from him for value and in good faith. Similarly mercantile agents, in possession of goods belonging to their principals, can effectively transfer the ownership of them, whether they are authorized thereto or not." Jurisprudence (6th ed.), pp. 414-5.

And the usual recording acts do not furnish absolute protection to an owner of real estate. If B buys a farm from A, and by the negligence of himself or the recorder of deeds his deed is not placed on record, C can get a good title from A if he purchases the farm without notice, actual or constructive, of B's title. This does not render the recording act void on the ground that it is a taking of B's property without due process of law. B would lose his property by reason of his failure to safeguard his interests and not by reason of any defect in the statute. That is the situation in the case at bar. R. 25.

Sections 40 and 42 of the Land Titles act are analogous to a statute of limitations. For instance, if a person is in the actual, exclusive, hostile, and notorious possession of lands for twenty years in Illinois, and for less periods in other states, his title is just as good as if he had an unbroken chain of title from the government; and one who was disseised however wrongfully has not by this statute been deprived of his property without due process of law. Furthermore, if the disseisee is in possession under color of title and has paid

taxes for a certain number of years—seven in Illinois—his title is unassailable. The Supreme Court of Illinois has held this limitation act constitutional. (*Steele* v. *Gellatly*, 41 Ill. 39.)

In other words, the law, for reasons of policy, must often choose who shall suffer injustice. And in their incidence *all* laws necessarily involve occasional injustice. But there is nothing inherently unjust in a law that first provides an owner with ample means of self-protection and then protects purchasers for value without notice where the owner has failed to avail himself of those means.

In denying the owner relief as against purchasers for value without notice from a fraudulent registered owner, the act has merely assimilated immovables to movables and applied doctrines which certainly are not alien to the common law. This is in line with the evolution of civil law from immovable to movable property.

See 3 Evolution of Law Series (Kocourek and Wigmore), pp. 658-60; (The Evolution of Civil Law, by Raoul DE LA Grasserie, sec. 29), where it is said:

> "Today a third stage appears. Movable property has in turn acted upon immovables. These are becoming as movable as the former. Their transmission is as simple; the tendency is to merge the two classes. * * * The end of the evolution is a complete assimilation of the two forms of wealth except for those differences which may survive in the case of certain movables by reason of the impossibility of fixing them even momentarily."

As Holdsworth points out:

> "* * * one of the chief reasons why the law as to the seisin and disseisin of hereditaments tended to fall apart from the law as to the possession and dispossession of chattels, was the fact that the first

was moulded by the real and second by the personal actions."

7 Holdsworth's History of English Law, pp. 80-1.

See also Maine, Early Law and Custom, p. 389.

There is no reason now why immovables should not be as expeditiously, cheaply and safely transferred as movables. Long ago in Illinois, livery of seisin and possession of land were declared to be unnecessary to a valid conveyance. Deeds are no longer effective so far as registered land is concerned. And possession of a duplicate certificate of title is now as important as possession of bank-notes, or the possession of land was in Bracton's time.

Take, for example, the case of an owner who has voluntarily intrusted his duplicate certificate of title to another, who fraudulently procured title to be registered in himself. His case is far better than that of one who formerly intrusted chattels to another, who subsequently parted with them. A *gift* by the perpetrator of the fraud will not prevent the recovery of the land. Nothing but a transfer for value without notice can do that, regardless *of how many times* it may be transferred.

Gibbs v. *Messer* (1891) A. C. 248, 60 L. J. P. C. 20;

Brown v. *Broughton* (1915) 8 W. W. R. 889, 31 W. L. R. 583, 25 Man. R. 489.

Not so, formerly, with the owner of chattels.

In *Holmes' The Common Law*, p. 169, we read:

"We find it laid down in the Year Books that, if I deliver goods to a bailee to keep for me, and he sells or gives them to a stranger, the property is vested in the stranger by the gift, and I cannot

maintain trespass against him; but that I have a good remedy against the bailee by writ of detinue (for his failure to return the goods). These cases have been understood, and it would seem on the whole rightly, not merely to deny trespass to the bailor, but any action whatever. Modern writers have added, however, the characteristically modern qualification, that the purchase must be *bona fide*, and without notice. It may be answered, that the proposition extends to gifts as well as to sales by the bailee, that there is no such condition in the old books, and that it is contrary to the spirit of the strict doctrines of the common law to read it in."

See also:

2 Pollock & Maitland, History of English Law, p. 153, *et seq.*

2 Holdsworth's History of English Law, p. 78, *et seq.*

In other words, one who entrusts a duplicate certificate of title to another is in the same position as one who entrusts money, or negotiable instruments or certificates of stock transferable by mere delivery, to another, and on familiar principles of common law, softened as a matter of grace. There exists no constitutional reason why a State may not provide that this shall be so.

It is said in 2 Pollock & Maitland, History of English Law (p. 95):

"* * * if one is put into seisin by the judgment of a court one is protected by the court's ban. A short term, in general a year and day, is given to adverse claimants for asserting their rights; if they allow that to elapse and can offer no reasonable excuse for their inertness, such as infancy or absence, they are precluded from action; they must forever after hold their peace, or, at all events, they will find that in their action some enormous advantage will be allowed to the defendant, as, for example, that of proving his case by his own unsupported

> oath. When Bracton charges with negligence and 'taciturnity' all those persons living in England who are silent while the land upon which they have claims is being dealt with by the King's court, this may look absurd enough, for how is a man in Northumberland to know of all the collusive suits that are proceeding at Westminster? But the courts of old times had been local courts; the freeholders of the district had been bound to attend them; and to the man who alleged that he was not at the moot when his land was adjudged to another, there was this reply—'But it was your duty to be there.'"

The act in the case at bar certainly is analogous. It says to the owner, *"Hold on to your duplicate certificate of title; no transfer of title can be made without its surrender. You may recover back your land from a wrongful 'disseisor' no matter how long he may hold it.* You *may also recover it from any feoffee of the wrongful disseisor,* EXCEPT *a purchaser for value without notice."*

And to the owner who alleges that he was not before the registrar of titles when his land was registered in another, there is the reply, "But it was your duty to be there." To insure his being called before the registrar all that he need do is to safely keep his duplicate certificate of title. *It is his duty to keep it.*

In Powell on Land Registration, Sec. 213, p. 178, it is said:

> "Likewise, public policy, expediency, and the need of repose and certainty as to land titles demand that the *bona fide* purchaser of a certificate of title to registered land, who, though he buys on a forged transfer, succeeds in having the land registered in his name, should nevertheless hold an unimpeachable title. There is more natural justice in recognizing his title as being valid than there is in recognizing as valid the title of one who has succeeded in ripening a forged color of title by prescription.

"In the first place, a forger cannot effectuate his forgery in the case of registered land by executing a transfer which can be registered, unless the owner has allowed him, in some way, to get possession of the owner's certificate. The act has erected in favor of the owner, as a safeguard, against a forged transfer being perpetrated against him, the requirement that no voluntary transfer shall be registered unless the owner's certificate is produced along with the instrument of transfer. Therefore, if the owner has voluntarily or carelessly allowed the forger to come into possession of his owner's certificate he is to be judged according to the maxim, that when one of two innocent persons must suffer by the wrongful act of a third person the loss falls on him who put it into the power of that third person to perpetrate the wrong. Furthermore, even if the forger stole the owner's certificate, the owner is up against no greater hardship than is experienced by one whose money or negotiable paper payable to bearer is stolen and transferred by the thief to an innocent purchaser." (Italics ours.)

See also:

American Land Co. v. *Zeiss*, 219 U. S. 47, 68-9;

Ballard v. *Hunter*, 204 U. S. 241.

So far as this case is concerned, the Illinois statute merely prescribes (a) how (registered) land shall be conveyed, and (b) a limitation on actions for the recovery of land by a 'disseisee.' The common law abounds with such statutes.

3 Holdsworth's History of English Law, pp. 9-10;

7 id. 50-51;

2 Pollock & Maitland, History of English Law, pp. 49-51;

Tyler v. *Judges of Court of Registration*, 175 Mass. 71, 55 N. E. 812, 813, 815-816.

Making a Torrens certificate conclusive evidence of title is not a new idea in American jurisprudence. It is merely an extension of the doctrine of estoppel which was given effect by our courts under the recording laws long before the Torrens system was known in America. Speaking of recording statutes, the United States Circuit Court of Appeals for the Eighth Circuit has said (Boynton *v.* Haggart, 120 Fed. 819, 57 C. C. A. 301, (Ark.):

> "It is the purpose and the legal effect of these statutes to make the title that appears of record—the record title—superior in the hands of an innocent purchaser for value to the real title that is withheld from registration. Hence, while one who has parted with his title to land by an unrecorded deed or decree has no title or interest remaining in himself, yet his deed to an innocent purchaser for value, by virtue of the registry statutes, avoids the effect of the prior unrecorded deed or decree, and vests the title to the land in the subsequent purchaser to the same extent as it would have done if the title of record had been the real title. The holders of unrecorded instruments are estopped by the statute and their negligence from denying that the record title is the real title."

In Kennedy *v.* Northup [1853], 15 Ill. 148, at 155, the Supreme Court of Illinois said:

> "In the case of Powers v. McFarren, 2 Serg. & Raw. 44, the supreme court of Pennsylvania held, under a statute like ours, that a deed from the heir should prevail over the unrecorded

deed from the ancestor, and they place it upon the broad ground that the expression 'subsequent purchasers' means subsequent purchasers from the heir as well as from the original grantor himself. After much reflection, I am satisfied that this is the true and proper construction of the statute. It meets the objects designed to be accomplished by the law, and is within the reason which gave rise to the enactment. It was the object of the legislature to make potent the titles to real estate, that purchasers might know what title they were acquiring. Where a deed is not recorded, the title is apparently still in the grantor, and the law authorizes purchasers who are ignorant of the conveyance to deal with him as the real owner. In case of his death, the heir becomes the apparent owner of the legal title; and it is equally important and equally as just that the public may be allowed to deal with him as with the original grantor, if living. This, it is true, can not with propriety be always permitted without cutting off devisees, and perhaps creditors. A will may be valid and convey the legal title to the devisee, although it may not be probated and recorded, or even known to exist for a long time, but when discovered the devisee may assert his legal title under it to the exclusion of the grantee of the heir who was the apparent legal owner, and so may creditors assert their claims within a certain time, and whoever purchases of the heir must take his conveyance subject to be thus defeated. This is no doubt an evil, which were it practicable and compatible with justice, it would be desirable to remedy. But because the statute could not be framed or

cannot be so construed as to meet every contingency, it is no reason why it may not accomplish the object of its enactment as far as that may be justly done. There is as much justice in protecting the purchaser from the heir as from the ancestor; and because this may not be done in every case, it is no reason why it shall not in any. It is true that neither the heir nor devisee could hold the title against the unrecorded deed, nor could the grantee in a voluntary deed. And yet the grantee in a subsequent conveyance may hold the title, if he purchases in good faith and for a valuable consideration, and his deed is first recorded; so that the fact that the apparent legal owner may not hold against the unrecorded deed does not prove that he may not convey to another who may hold against such deed. *When the title once vests in or passes through meritorious hands, it becomes purified, and is as valid and effectual as if it had never been exceptionable.* Although the heir himself might not prevail against this unrecorded deed, it does not follow that he may not convey to one who may prevail."

And the foregoing brings us to a criterion that has often been applied by this court.

G.

The Power of the State to Legislate with Respect to Land Titles and to Declare by Law What Shall Constitute an Indefeasible Title Has Long Been Recognized. Land Title Registration Acts Similar to the Illinois Statute Are Now in Effect Throughout the World and Have Been Sustained by the Courts of Many Jurisdictions.

As we have seen (*supra*, p. 12) land title registration acts are no longer new. Those acts which derive from the Real Property Act of South Australia, which has been in operation since 1858, have been recognized as valid legislation by this court, by the Supreme Courts of sixteen states of the United States, by the highest courts of scores of jurisdictions of the British Empire, and by the courts of other jurisdictions. In *Block* v. *Hirsch*, 256 U. S. 135, at 158, this court said:

> "It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world is futile or has no reasonable relation to the relief sought."

In *Cunnius* v. *Reading School District*, 198 U. S. 458, it was contended that the State of Pennsylvania was without power to provide for the administration of the property of an absentee, also that the method of procedure authorized by the statute was so lacking in notice as not to constitute due process of law. The court, after pointing out that the "question was, not the wisdom of the statute, but whether it was so beyond the scope of municipal government to provide for the administration of the estate of absentees under the condi-

tions enumerated in the Pennsylvania law [absence for seven years; notice by publication, etc.]," continued as follows:

> "We do not pause to demonstrate, by original reasoning, that the right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments, to the end that they may be able to perform the purposes for which government exists. This is not done, because we propose rather to test the question by ascertaining how far such authority has been deemed a proper governmental attribute in all times and under all conditions. If it be found that an authority of that character has ever been treated as belonging to government and embraced in the right to protect and foster the well-being and order of society, it must follow that that which has at all times been conceded to be within the power of government, cannot, in reason, be said to be so beyond the scope of governmental authority that the exertion of such a power must me held to be a want of due process of law, even although there is no constitutional limitation affecting the exercise of the power."

The court then examined the Roman Law, and the laws of several states of Continental Europe. Finding that authority to provide for the administration of the property of an absentee had always been treated as belonging to government, the court upheld the statute.

The Torrens act merely provides (a) how titles to land may be registered, (b) how they shall be conveyed, and (c) the effect of registration. The Torrens act is, therefore, at once a statute of frauds, a statute of limitations and a recording statute.

All peoples, in all ages, have, by one means or another, specified what things shall be the subjects of ownership, who may own them, and upon what conditions. Private

property in land is a product of history, and a relatively recent one at that.

Wissler, The American Indian (2nd ed.) pp. 183-4;

Sumner and Keller, The Science of Society, vol. 1, pp. 247-350;

Lowie, Primitive Society, (12th ed.) pp. 204-56;

Hobhouse, Morals in Evolution (4th ed.) pp. 324-45;

Wissler, Man and Culture, pp. 242-3;

Vinogradoff, Historical Jurisprudence, vol. 1, pp. 321-2;

Brissaud, History of French Private Law, (Continental Legal Series, vol. 3, pp. 30-54.)

Wherever it has been recognized, the essentials of a valid conveyance, the effect thereof, and how title thereto may otherwise be lost or acquired, have universally been prescribed by law.

It is surprising indeed to hear it asserted that an act that prescribes how (registered) land shall be conveyed and a limitation upon an action for its recovery by a disseisee is beyond the competence of a state,—particularly one that derives its law from the common law of England, which does not recognize absolute ownership of land, but only *tenure*, and tenure in chivalry, by which the greatest part of the lands were once held, was subject to aids, relief, primer seisin, wardship, marriage, fines for alienation and escheat.

1 Pollock & Maitland, History of English Law, p. 288;

3 Kent's Commentaries (Lacy's ed.) *p. 506.

In view of the assize of novel disseisin, the many statutes of limitation, courtesy, dower, rules with respect to unfree tenures, the Statute of Quia Emptores, the Statute of Uses, the Statute of Enrolment, the Statute De Donis, the Statute of Frauds, the statutes making land liable for debt, the statutes against maintenance (which prohibited the conveyance of land adversely held by another), the statutes with respect to fraudulent conveyances, the rules against perpetuities and accumulations, and the many statutes pertaining to wills, to say nothing of the disabilities of aliens, women and minors, is there, *can* there be any doubt of the competence of the State of Illinois to pass the Torrens Act?

In the history of Anglo-American law, conveyances of estates or interests in land have assumed many different forms.

7 Holdsworth's History of English Law, pp. 353-4;

2 Pollock and Maitland, (op. cit.) p. 84 *et seq.*;

2 Vinogradoff, Historical Jurisprudence, p. 232.

Not only the forms of conveyances, but their legal effect, have been prescribed by law again and again. Holdsworth states that "in the Middle Ages the forms of conveyance at the disposal of the freeholder fell into two main classes—those which took effect by the act of the parties, and those which depended for their efficacy upon the machinery of the court. (Vol. 7, p. 353.) And there are three significant respects in which the Torrens act finds warrant in common law practices. First, in the publicity and certainty given to conveyances; second, in the efficacy given to conveyances by the machinery of courts; and third, in providing a record that may be consulted and relied on by all concerned.

In his Early Law and Customs, (p. 352 *et seq.*) Maine says that land title registration acts are in principle a reversion to primitive practices. He points out that even after land became private property the community retained large rights over it, and without its consent it could not be transferred. He refers to the land registries of the State of Hesse-Darmstadt and of the Swiss Canton of Zurich, and says that they have the highest commendation from juridical writers. These systems are very similar to the Torrens system of land title registration.

In the case of *Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 55 N. E. 812, Mr. Chief Justice Holmes pointed out the analogy between the proceedings for initial registration and a fine at common law, and also that what the registrar does he does as an officer of the court. (See secs. 15, 91, 93 and 94 of the Illinois Act.) If the registrar is not a hand of the court so far as transfers of registered land are concerned, then he is an administrative officer with power to pass upon certain matters, subject to the court's supervision. This affords due process of law as we have seen. And the title is made a matter of public record, and by authority of law concludes all concerned. This is sound common law practice. See

3 Holdsworth, (op. cit.) pp. 234-54;

1 Pollock and Maitland, (op. cit.) p. 630;

2 id. p. 89;

19 Green Bag, 338, quoting Bohun, Privilegia Londini;

4 Kent's Commentaries, *pp. 484-5.

The fundamental difference between a recording statute and the Torrens act is that the former deals with

evidences of title and the latter with *titles*. Standing alone, they differ in content, although both were motivated by the desire to insure security of titles and to expedite transfers. When, however, to recording statute are added the existing statute of frauds, the statute of limitations and the various actions for the recovery of land, quieting title, etc., there is no essential difference in content so far as the power of the state to legislate is concerned. When we borrowed from Australia registration of title we already had well-organized machinery to do the work.

In the Greek City-Commonwealths of the fourth and fifth centuries B. C., there was registration of documents concerning land tenure, constitution of dower, transfer of landed property and the establishment of mortgages and fiduciary sales.

2 Vinogradoff, Historical Jurisprudence, pp. 204, 216, 222, 237, 239, 259-63.

Professor Vinogradoff states that the officials superintending registration were not mere automatons. In many cases the validity of transactions depended upon confirmation by these officials. (Pp. 259-60, 203-4.)

In Rome, even before the XII. Tables, Servius Tullius provided for a register of the citizens (*census*) that contained, among other things, a list of their lands. This "*census*" assured, as far as possible, certainty of title, as it was declared that no transfers of property enrolled in it would be recognized unless made by public conveyance with observance of certain prescribed formalities."

23 Encyc. Brit. (13th ed.) p. 529.

The first attempt to introduce general registration of

conveyances in England was the Statute of Enrolments passed in the twenty-seventh year of Henry VIII.

16 Encyc. Brit. (13th ed.), p. 162, 164.

This statute provided that from the last day of July, 1536, no bargains and sales of estates of freehold should be valid, unless made in writing under seal, and enrolled within six months of the date of the deed in one of the King's courts of record at Westminster, or in the county where the lands were situate.

4 Holdsworth's History of English Law, pp. 450-61.

A comprehensive statute was subsequently passed in 1704.

2 and 3 Anne, c. 4.

It provided that all deeds, conveyances and wills should be registered in a public office created by the statute, which, however, applied only to the West Riding of the County of York, which was then an active center of the wool industry.

In 19 Green Bag, 335, there is an intensely interesting article by Professor Joseph H. Beale, Jr. on "The Origin of Recording Deeds in America." He states that the present Massachusetts act goes back with no substantial change to October 7, 1640. The earliest record on the books of the Plymouth Colony of a transfer of land is a deed in 1627, "which is not merely copied into the book, but was apparently written out for the first time on the book and there signed by the parties, the writing on the page being the actual deed itself." P. 336.

On April 1, 1634, the General Court of Massachusetts ordered a sort of colonial domesday book. It was provided that the constable and four of the chief inhabitants of every town, to be chosen by the freemen, with the ad-

vice of some one or more of the next assistants, should "make a survey of houses and lands and enter the same in a book with the several bounds and quantities by the next estimation

> " '& shall deliuer a transcript thereof into the Court within sixe monethes nowe nexte ensueing, & the same soe entered and recorded shal be a sufficient assurance to every such ffree inhabitant, his & theire heires and assignes, of such estate of inheritance, or as they shall have in any such howses, lands, or ffranke-tenements.' " (p. 337.)

Professor Beale pertinently remarks:

> "This provision, which practically made an entry in the book of possessions a guaranteed title of the land, seems to furnish the first indication of the present rule of priority." (p. 337.)

The necessity for an improved system of land title registration is pointed out in 17 Columbia Law Review, p. 354, where it is said:

> "The disadvantages of the recording system lie in the fearfully complicated state of the record title of land which is frequently conveyed or encumbered, and the constant liability of the owner to suits on both recorded and unrecorded claims. The purchaser of realty, to obtain even reasonable protection, must procure the services of a searcher to prepare an abstract of all the deeds, mortgages, *lis pendens*, and other documents affecting the property recorded in the county court-house for years back; and he must also procure an attorney's opinion on the validity of those instruments as affecting the legal status of the title; or he may accept the doubtful security of a warranty deed. Even the utmost precautions cannot assure him an indefeasible title; unsuspected claims, such as the dower right of unknown widows, may arise to cast a cloud upon it."

See also:

8 Columbia Law Review, 438, 442.

Thom, Canadian Torrens System, p. 6 *et seq.*, "Defects of 'Old Systems.' "

Then there is the *expense*. In 8 Columbia Law Review, 438, 442, it is said:

> "Most prominent, however, and absolutely fundamental as objections to such a system, are the expense and time required for re-examination of titles whenever they are passed or encumbered. These patent defects and inconveniences have called, again and again, for investigation and attempts at relief. Practical men have refused, and will always refuse, to believe that a title hundreds of years old must continue to be examined, either from its beginning or from an indefinite time in the past, over and over again, whenever it is transferred or encumbered."

This delay, expense and uncertainty not only affect real estate values, but constitute an economic burden which is repeated with every transfer, every mortgage, every lease of any importance, etc. In the aggregate this burden is stupendous.

This court on numerous occasions has recognized that a change in conditions not only justifies, but requires, legislation which under other circumstances might be held to be unconstitutional.

Block v. *Hirsh*, 256 U. S. 135;

Hadacheck v. *Sebastian*, 239 U. S. 394;

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365.

Of necessity "the new is never more than a slight ripple on the deep foundation of the old and established."

26 Goldenweiser, Early Civilization, p. 18.

Change is rarely possible until conditions have become almost intolerable, and relief, not inconvenience, is the ordinary consequence of modification of existing laws.

The private property marks of savage tribes, the pillars of stone in ancient Greece, *mancipatio, traditio et usucapio, in iure cessio,* feoffment with livery of seisin, the customs of public nams, proceedings in manorial courts, borough customs, fines, the exection, witnessing, acknowledgment and delivery of deeds, the Statute of Enrolments, the West Riding statute, the early ordinances in Plymouth colony and in the colony of Masachusetts, the modern recording statutes and other statutes above alluded to, the title registration acts which affect the most valuable lands on the globe, are all merely attempts by different peoples at different epochs and under varying conditions, to assure *security of titles.*

The security of titles to land is a matter that vitally affects the public welfare. It is essentially a local matter, and only in a clear case of infringement of constitutional rights will this court interfere.

Arndt v. *Griggs,* 134 U. S. 316;

American Land C. v. *Zeiss,* 219 U. S. 47;

United States v. *Crosby,* 7 Cranch, 437;

Ballard v. *Hunter,* 204 U. S. 241;

Mundy v. *Wisconsin Trust Co.* 252 U. S. 499.

The following especially interesting cases all deal with the due process clause of the Fourteenth Amendment, and may profitably be consulted in the case at bar.

Jackman v. *Rosenbaum Co.,* 260 U. S. 22;

North American Cold Storage Co. v. *Chicago,* 211 U. S. 306;

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365;

Von Oster v. *Kansas*, 272 U. S. 465;

Cummins v. *Reading*, 232 U. S. 336.

We have seen that the Torrens act afforded appellants due process of law because it provided for a public hearing and caused to be issued to them in advance a summons (duplicate certificate of title) which would inevitably have procured their attendance before the registrar of titles, if they had not carelessly surrendered it to another. We have also seen that the conditions that existed before the passage of the act called loudly for remedy, and that the underlying principles of the act are well known to the common law. The act is admirably adapted to effectuate the purposes of the legislature, and has been adopted throughout the civilized world. Similar practices were in force in parts of Germany hundreds of years before the discovery of America. It would be absurd to say "that that which has at all times been conceded to be within the power of government" is "so beyond the scope of governmental authority" as to be a want of due process of law.

We respectfully submit (1) that no substantial Federal question is submitted for decision on this record, (2) that appellants have waived their right to question the constitutionality of the Illinois Land Title Registration Act, and (3) that this statute affords owners of registered land due process of law and equal protection of the law. Therefore, the appeal should be dismissed or the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

FLOYD E. THOMPSON,
HENRY JACKSON DARBY,
Solicitors for Appellees.

APPENDIX.

Synopsis of An Act Concerning Land Titles with pertinent sections quoted in full.

Smith-Hurd Illinois Statutes, Chap. 30, Par. 45, *et seq.*
Cahill's Illinois Statutes, Chap. 30, Par. 49, *et seq.*

Section 1. Recorders of deeds are made registrars of titles.

Section 2. Registrar required to file bond.

Section 3. Registrar required to establish escrow department "where documents and funds may be received and held in escrow pending the closing of transactions affecting registered land or non-registered land in process of registration."

Section 4. Registrar and deputies forbidden to accept engagement as attorney in connection with registered land.

Section 5. Registrar may appoint lawyers as examiners of titles.

Section 6. Registrar liable for omission of duty of himself and/or his deputies.

Section 7. Owner of any estate or interest in land, whether legal or equitable, may apply for registration.

Section 8. No estate may be registered unless fee simple estate is first registered.

Section 9. Every lesser estate or charge shall be noted upon the certificate of title, and the title certified shall be subject only to such estates or charges noted, except as in other sections provided.

Section 10. No tax title shall be registered unless applicant or predecessors have been in actual and undisputed possession for ten years, and have paid taxes for seven years.

Section 11. Application shall be in writing and verified and shall give history of applicant and estate as specified in this section.

Section 12. Several tracts may be registered together.

Section 13. Form of application prescribed.

Section 14. Amendments must be in writing and verified.

Section 15. Application may be made to court of

chancery and it shall have power to determine all interests.

SECTION 16. Applications shall be docketed in "Land Registration Docket."

SECTION 17. All orders shall be minuted in such docket.

SECTION 18. Applications may be referred by court to examiner of titles for hearing and report.

SECTION 19. Summons shall be issued and served as in chancery.

SECTION 20. Notice shall be published for four successive weeks.

SECTION 21. Copy of notice shall be mailed to named defendants, whose addresses are known and who are not personally served.

SECTION 22. Other interested persons may intervene and contest application.

SECTION 23. Application taken as confessed on default.

SECTION 24. Court not bound by report of examiner.

SECTION 25. Court shall find all interests and order registrar to enter same as found.

SECTION 26. Decree entered shall be forever binding and conclusive on all parties to application, except that it may be reviewed by Supreme Court on appeal as in other cases in chancery or by writ of error if sued out within two years. Any person not served who has an interest may have decree opened up if application is made within two years.

SECTION 27. Suits for recovery may be brought within two years where, because of some irregularity, insufficiency or other cause, parties are not bound by decree.

SECTION 28. Persons having interests upon which no cause of action has accrued at time of registration shall file notice of same within two years; and when such notice is filed may bring action within one year after right of action accrues but not afterwards. Life tenant or trustee shall file claim of remainderman or reversioner and guardian of ward.

SECTION 29. Registrar shall register title as decreed.

SECTION 30. Form of certificate of title prescribed.

SECTION 31. Subsequent certificates shall be in same form except shall show transfer number and date of first registration.

SECTION 32. "Heirs and assigns" not necessary to create fee simple.

SECTION 33. Requisites of certificate of title prescribed.

SECTION 34. Tenants in common may receive one certificate for the entirety or each a certificate for undivided share.

SECTION 35. Registrar shall keep a "Register of Titles" wherein shall be entered all first and subsequent original certificates of title.

SECTION 36. "The registrar shall, at the same time that he makes out his original certificate of title, make out an exact duplicate thereof, with the memorials and notations thereunder noted, which shall be delivered to the owner and shall be known as the owner's duplicate."

SECTION 37. "For the purpose of preserving evidence of the handwriting of the owner in his office, it shall be the duty of the registrar to take from the owner, in every case where it is practicable so to do, his receipt for the certificate of title, or whatever paper shall be issued to him, signed by the owner in person. When such receipt is signed in the registrar's office it may be witnessed by the registrar or some deputy. If signed elsewhere it may be acknowledged before any officer authorized to take acknowledgment of deeds. When so signed and witnessed or acknowledged, such receipt shall be prima facie evidence of the genuineness of such signature."

SECTION 38. "In every case of final registration the certificate of title shall relate back to and take effect as of the date of the order or decree directing the registration, and all dealings with the land and all statutory or other liens upon the same subsequent to the filing of the application shall be subject to such order or decree of the court."

SECTION 39. Until time for contest has expired certificate of title and duplicate shall be prima facie evidence that title is as therein stated, and thereafter conclusive evidence.

SECTION 40. "At the time of issuing any certificate of title to registered property, or of making any transfer of registered property, or of the entry upon the register of titles of any memorial relating to registered property, the registrar of titles shall search for and enter upon the proper folium of the register of titles

memorials as to the following charges upon such registered property, to-wit:

(a) Unpaid general taxes for the year immediately preceding the calendar year in which the certificate of title is issued, or transfer made, or memorial entered, and for which no sale or forfeiture has been had (together with any unredeemed forfeitures for general taxes for prior years extended and added thereto).

(b) Unpaid general taxes, the collection of which has been suspended or held in abeyance, but not permanently enjoined or defeated, by legal or equitable proceedings.

(c) Unredeemed forfeitures for general taxes for the year immediately preceding the calendar year in which the certificate of title is issued, or transfer made, or memorial entered (together with any unredeemed forfeitures for general taxes for prior years extended and added thereto).

(d) Unpaid confirmed special taxes or assessments for which a sale of the land or forfeiture has not been had.

(e) Unredeemed forfeitures for special taxes or assessments.

If at the time the certificate of title is requested to be issued, or transfer requested, or memorial requested to be entered, a sale of the land for any tax or special assessment has been had, and the period for presentation of the certificate of sale to the registrar of titles under section 82 of this Act has not elapsed, said certificate of title shall not be issued or transfer made or memorial entered until proof of the proper deposit for redemption or of the cancellation of such sale has been made to the registrar of titles, or until the holder or holders of the outstanding certificate of title shall file with the registrar of titles a written direction to enter a memorial of such certificate of sale upon the register of titles, which memorials shall be so entered by the registrar of titles before issuing said certificate or making such transfer or entering such memorial so requested.

For such search relating to taxes, special assessments and forfeitures, the registrar of titles shall charge the sum of one dollar, of which fifty cents shall be paid into the general corporate fund of the county and fifty cents

shall be paid into the indemnity fund provided by this Act.

The registered owner of any estate or interest in land brought under this Act shall, notwithstanding any rules of the common law to the contrary except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all other except:

(1) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed.

(2) Such right of appeal, writ of error, right to appear and contest the application, and action to make counterclaim as is allowed by this Act."

SECTION 41. "After land has been registered no title thereto adverse or in derogation to the title of the registered owner shall be acquired by any length of possession."

SECTION 42. "Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

SECTION 43. In suit for specific performance certificate is conclusive evidence of title.

SECTION 44. In an action for possession of land with certain exceptions certificate is conclusive evidence of title.

SECTION 45. Memorials shall be carried forward on certificates until cancelled.

SECTION 46. "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens,

incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

SECTION 47. "A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferee has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and *folium* in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'cancelled.'"

SECTION 48. When only part of registered land transferred, memorial transfer may be made on grantor's certificate.

SECTION 49. "Every transfer of registered land shall be deemed to be registered under this act when the new certificate to the transferee shall have been entered, as in the case of first registration; and all other dealings shall be considered as registered when the memorial or notation shall have been entered in the register upon the *foliam* constituted by the existing certificate of title of the land. But, for the protection of the transferee or person claiming through any transfer or dealing, the registration shall relate back to the time of filing in the registrar's office the deed, instrument or notice, pursuant to which the transfer, memorial or notation is made."

SECTION 50. Registrar shall mark as filed deeds, etc., filed in his office.

SECTION 51. All instruments filed shall remain in registrar's office.

SECTION 52. Deeds, etc., sufficient in law may be used.

SECTION 53. Addresses of interested persons must be kept with registrar.

SECTION 54. "A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding five years where the land is in actual possession of the lessee or his assigns, shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this act. On the completion of such registration, the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

SECTION 55. Provision respecting tax sales, dower, etc., on registration of transfer.

SECTION 56. Certificate shall state marital status.

SECTION 57. Provision for separate or joint certificates for several parcels.

SECTION 58. Provision for procuring copy of original certificate where owner's duplicate is lost.

SECTIONS 59-66. Provisions relating to mortgages, leases and other charges.

SECTION 67. Power of attorney must be filed and entered.

SECTIONS 68-92. Provisions relating to trusts, conditions, limitations, transmission upon death of owner, dealings of assignees, receivers and masters, tax sales, *lis pendens*, judgments, attachments, executions, liens, memorials of adverse claims, etc.

SECTION 93. "Whenever any person interested in registered land, or any estate or interest therein, or charge upon the same, shall be entitled to have any certificate of title, memorial or other entry upon the register cancelled, removed or modified, and the registrar or person whose duty it shall be to cancel, remove or modify the same, shall upon request, fail or refuse so to do, or is absent from the county, or can not be found, or for any reason such request cannot be made upon him, or where under the provisions of this Act the registrar has no power or authority to make a transfer until he shall have been di-

rected so to do by an order of court, the circuit court of the county where the land is registered, may upon petition by the person interested, make such order as may be according to equity in the premises.

And in every proceeding in which a final decree shall have been entered directing the registration of any tract or parcel of land the court shall retain jurisdiction to enter any order which may be proper to give effect to the provisions of this section."

SECTION 94. "Any person feeling himself aggrieved by the action of the registrar, or by his refusal to act in any matter pertaining to the first registration of land, or any estate or interest therein, after the first registration of any transfer of or charge upon the same, the filing or neglect or refusal to file any instrument, or to enter or cancel any memorial or notation, or to do any other thing required of him by this Act, may file his petition in the circuit court in the proceeding in which the land was registered, making the registrar and other persons, whose interest may be affected, parties defendant, and the court may proceed therein and make such order or decree as shall be according (to) equity in the premises and the purport of this Act. Nothing in this section contained shall bar such person from filing an original bill or petition in such cases in equity in any court of competent jurisdiction."

SECTION 95. "Nothing contained in either of the two preceding sections shall be so construed as to remove the bar of any order or decree, or extend the time of limitation hereinbefore provided, nor to affect the right of any *bona fide* purchaser or incumbrancer without notice filed with the registrar and noted as in case of other memorials."

SECTION 96. Court may award damages including attorneys' fees to be paid from indemnity fund.

SECTIONS 97-98. Registrar shall keep indices.

SECTIONS 99-100. Registrar shall collect upon initial registration sum equal to one-tenth of one per cent of value of land registered and pay it into the county treasury to be held as an indemnity fund.

SECTION 101. "Any person sustaining loss or damage through any omission, mistake or misfeasance of the registrar, or of any examiner of titles, or of any deputy or clerk of the registrar in the performance of their respective duties under the provisions of this Act, and any

persons wrongfully deprived of any land or any interest therein, through the bringing of the same under the provisions of this Act, or by the registration of any other person as owner of such land, or by any mistake, omission or misdescription in any certificate, or in any entry or memorandum in the register book, or by any cancellation, and who by the provisions of this Act is barred or in any way precluded from bringing an action for the recovery of such land or interest therein, or claim upon the same, shall have a right of action for the damages thus sustained against the county in which such land shall be registered, and may file a claim with the county board, or bring an action at law against the county in which said land is situated for the recovery of such damages."

SECTIONS 102-103. Proceedings for collection of claim and limitation of action.

SECTIONS 104-106. Penalties for fraud, forgery, etc.

SECTION 107. Fees of clerk of court.

SECTION 108. Fees of registrar.

SECTION 108a. Application of Act to pending cases.

SECTION 109. "This act shall be construed liberally so far as may be necessary for the purpose of effecting its general intent."

SECTION 110. "The provisions of this act shall not apply to land in any county until this act shall have been adopted by a vote of the people of the county" at a general election.

SECTION 111. Emergency clause meaning act received vote of more than two-thirds of all members elected to each house.

POINTS MADE BY APPELLANTS.

in the Supreme Court of Illinois as shown by clerk's certificate on file.

I.

Unless it be by virtue of some provision of the Land Titles Act, no title to real property can pass by virtue of a forged deed.

[Citations]

II.

Sections 40 and 42 of the Land Titles Act do not, by their terms, include registered titles based upon forged instruments and there is no provision in said act covering such titles.

[Citations]

III.

If Sections 40 and 42 of the Land Titles Act be held to cover by their terms registered titles based upon forged instruments, said Sections 40 and 42 are unconstitutional and prohibited by Amendment V to the United States Constitution and Section 2 of Article II of the Constitution of Illinois.

[Citations]

Rule 15 of the Rules of Practice of the Supreme Court of Illinois, in force at the time of the hearing of this cause and appearing at page 16 of Volume 319 of the Official Reports of said court, in so far as it applies to the points which will be considered by the court, reads as follows:

> "Each party shall file a printed brief in the cause. * * * No alleged error or point not contained in such brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing."

Certificate of Charles W. Vail, Clerk of the Supreme Court of Illinois, showing that the three points stated above are the only points raised by appellants in their principal brief in that court, and also showing the pertinent provision of Rule 15 of the Rules of Practice of that court then in effect.

MOTION

FILE COPY

MAR 1

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION OF NATIONAL ASSOCIATION OF REAL ESTATE BOARDS FOR LEAVE TO APPEAR AND JOIN IN BRIEFS.

NATHAN WILLIAM MACCHESNEY,
Counsel for National Association of Real Estate Boards.

BARNARD & MILLER PRINT, CHICAGO

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MOTION.

The National Association of Real Estate Boards, a corporation not for pecuniary profit, organized and existing under and by virtue of the laws of the State of Illinois, hereby asks leave to appear in the above entitled case as *amicus curiae* by its General Counsel and to join in the Brief of Appellee and the Brief and Argument of Clayton F. Smith, Registrar of Titles of Cook County, Illinois on Merits of Case, filed herein.

NATHAN WILLIAM MACCHESNEY,
General Counsel for
National Association
of Real Estate Boards.

STATEMENT IN SUPPORT OF MOTION.

The National Association of Real Estate Boards was organized as a corporation not for pecuniary profit in 1908 with the object of uniting the real estate men of America for the purpose of exerting effectively a combined influence upon matters affecting real estate interests.

The membership of the National Association of Real Estate Boards consists of local real estate boards. This membership is now made up of 625 Constituent Member Boards throughout the United States and Canada (8 boards in Canada) which local boards have a total membership of nearly 40,000. Affiliated with the National Association of Real Estate Boards are 33 state associations of real estate boards which represent in an intimate way the real estate interests of the states. In the 22 states and territories of the United States in which land registration acts have been enacted there are 287 Constituent Members Boards of the National Association of Real Estate Boards which have a total membership of over 21,000. The total membership of the 34 Member Boards in Illinois is over 4,400. For 16 of these states there are also state associations of real estate boards.

The activities of the National Association of Real Estate Boards are carried on largely through subsidiary organizations known as Divisions. There are 10 such Divisions: Appraisal Division, Brokers' Division, Cooperative Apartment Division, Farm Lands Division, Home Builders and Subdividers Division, Industrial Property Division, Mortgage and Finance Division, Property Management Division "Realtor" Secretaries Division and Property Owners Division. These Divisions are organized for practical re-

search, for raising the standards of the business and for protecting real estate.

The entire membership of the National Association of Real Estate Boards and all of its Divisions approve the general purpose of the Torrens System of registration of land titles. The 21,000 members of the constituent real estate boards in states now having such laws are interested in maintaining and improving them. The whole membership is interested in extending the system to other states.

The Code of Ethics of the National Association of Real Estate Boards begins with the phrase "Under all is the land." Consequently the interest of the membership of the national organization in this case centers in two basic ideas:

(a) Sound titles of land, and

(b) Simplification of the transfer of land.

These principles are particulary vital to home builders and to members of the Property Owners Division.

The National Association of Real Estate Boards favors the Uniform Land Registration Act drafted and approved by the National Conference of Commissioners on Uniform State Laws in 1916 (Handbook of National Conference, 1928, p. 580), and approved by American Bar Association in the same year (Reports of American Bar Association, Vol. XLI, pp. 26, 428). This uniform act is similar in character to the Torrens Act adopted in the various states.

For these reasons, it is the concern of the National Association of Real Estate Boards, and of its Member Boards throughout the United States and Canada, to defend the Illinois Torrens Act against constitutional attack in this court. It is for this purpose that the National Association

of Real Estate Boards asks leave to appear and to join in the briefs filed in support of the law.

Respectfully submitted,

NATHAN WILLIAM MACCHESNEY,
General Counsel for
National Association
of Real Estate Boards.

MACCHESNEY, WHITEFORD & WELLS,
Of Counsel.

FILE COPY

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CHARLES EL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

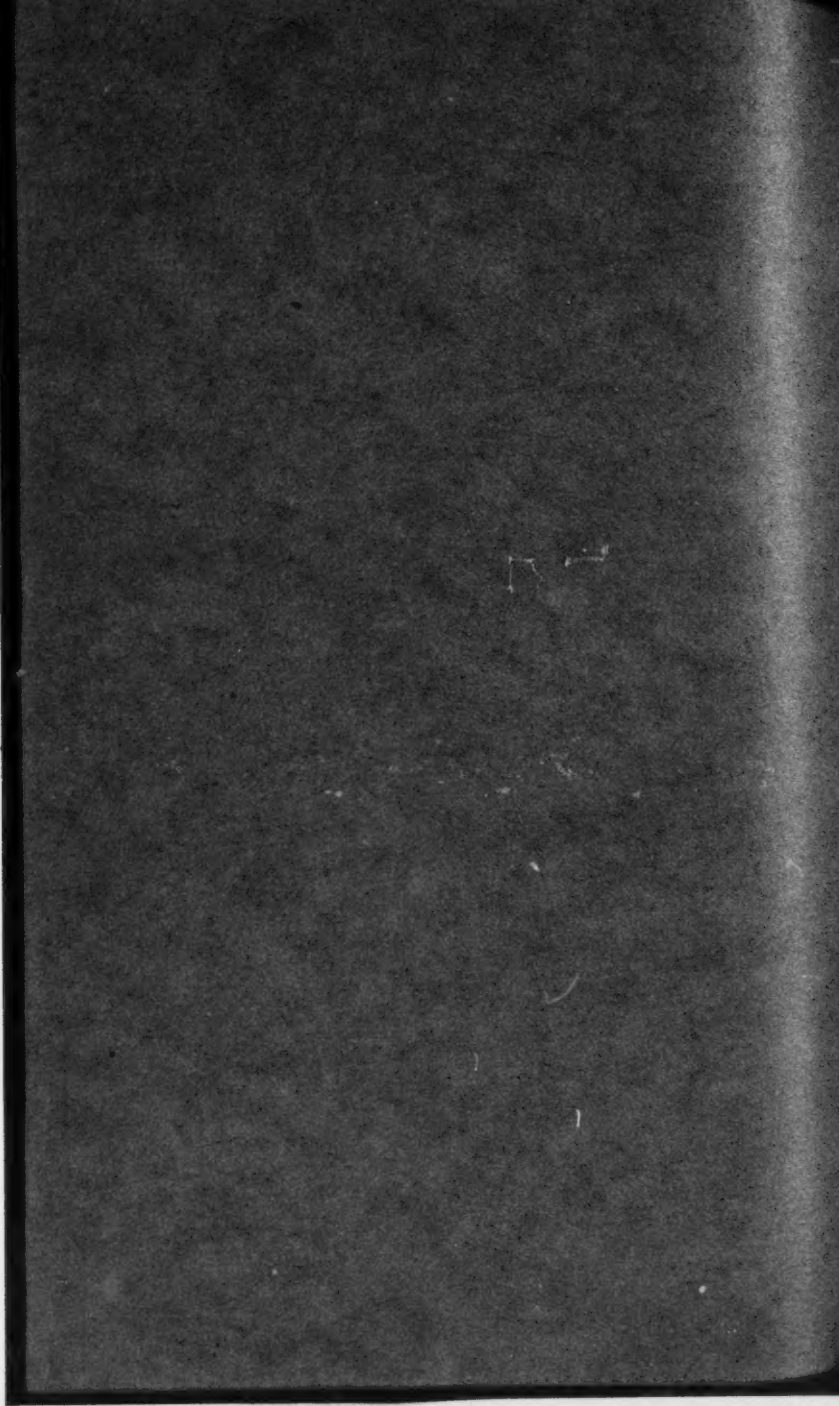
CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS FOR LEAVE TO APPEAR AND JOIN IN BRIEFS.

NATHAN WILLIAM MACCHESNEY,
Attorney and Counsel for National Conference of Commissioners on Uniform State Laws.

BARNARD & MILLER PRINT, CHICAGO



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347.

EDWARD ELIASON and ELIN ELIASON,

Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION.

The National Conference of Commissioners on Uniform State Laws hereby asks leave to appear in the above entitled case as *amicus curiae* by its attorney and counsel and to join in the Brief of Appellee and Brief and Argument of Clayton F. Smith, Registrar of Titles of Cook County, Illinois, on Merits of Case, filed herein.

NATHAN WILLIAM MACCHESNEY,
Attorney and Counsel for
National Conference of Commissioners
on Uniform State Laws.

STATEMENT IN SUPPORT OF MOTION.

The National Conference of Commissioners on Uniform State Laws in 1916 drafted and approved "An Act to Provide for the Settlement, Registration, Transfer, and Assurance of Titles to Land, and to Establish or Designate Courts of Land Registration, with Jurisdiction for Said Purposes, and to Make Uniform the Laws of the States Enacting the Same," which, Section 1 provides, may be cited as The Uniform Land Registration Act (Handbook, National Conference 1928, p. 580). The American Bar Association approved this uniform act the same year, 1916, and recommended it for enactment by the legislatures of the various states. (Reports of American Bar Association, Vol. XLI, pp. 26, 428.) The Commissioners' Note appended to the Act shows it is similar to the statutes obtaining in a number of the states (9 Uniform Laws Annotated 150). The Uniform Land Registration Act has been adopted in Georgia, Utah and Virginia.

§74 of the uniform act provides that every registered owner under it shall hold the land free of any adverse claims, rights or encumbrances (with three exceptions). §75 of the uniform act provides that §74 shall not apply to the benefit of the registered owner in cases of fraud or *forgery* to which he is a party or in which he is a privy without valuable consideration paid in good faith. This section (§75 of the uniform act) is similar to Section 40 of the Torrens Act of Illinois except that the word *forgery* does not appear in the Illinois Act.

The appellants contended in the Supreme Court of Illinois that, if sections 40 and 42 of the Illinois Act be held to cover registered titles based upon forged instruments, they are unconstitutional; in other words, if section 40 of

the Illinois Act is construed to include *forgery* (which is specifically included in the uniform act), it is unconstitutional.

It is particularly for this reason that the National Conference of Commissioners on Uniform State Laws is interested in the defense of the Illinois Act against the attack that it is unconstitutional in the respect claimed by the appellants, and asks leave to appear and join in the briefs supporting the law.

NATHAN WILLIAM MACCHESNEY,
Attorney and Counsel for
National Conference of Commissioners
on Uniform State Laws.

MACCHESNEY, WHITEFORD & WELLS.
Of Counsel.

FILE COPY

FILED
MAR 13 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, A. D. 1929.

No. 347.

EDWARD ELIASON and ELIN ELIASON,
Appellants

v.

CHARLES WILBORN, CARRIE WILBORN and NOEL STATE BANK,
Appellees.

Appeal from Supreme Court of Illinois.
There Heard on Appeal from Circuit Court
of Cook County.

MOTION TO PASS CASE AND SUGGESTIONS IN SUPPORT THEREOF.

FLOYD E. THOMPSON,
Solicitor for Appellees.

U. S. Printing Company, 2817 N. Halsted St., Chicago, Ill.

IN THE

Supreme Court of the United States

October Term, A. D. 1929.

No. 347.

EDWARD ELIASON and ELIN ELIASON,
Appellants.

v.

CHARLES WILBORN, CARRIE WILBORN and NOEL STATE BANK,
Appellees.

MOTION TO PASS CASE AND SUGGESTIONS IN SUPPORT THEREOF.

MOTION TO PASS CASE.

Come now appellees, by their solicitor, Floyd E. Thompson, and move that this case be passed until the week of May 5, 1930, if arguments are to be heard during that week, or, in the alternative, that said case be passed to the middle of the week of April 28, 1930, for the reasons assigned in the suggestions filed herewith.

CHARLES WILBORN,
CARRIE WILBORN,
NOEL STATE BANK,
By Floyd E. Thompson,
Their Solicitor.

SUGGESTIONS IN SUPPORT OF MOTION.

State of Illinois,
County of Cook—ss.

FLOYD E. THOMPSON, being first duly sworn, on his oath states:

He is a member of the bar of this honorable Court and the principal solicitor for appellees in this cause. He was specially employed by the Cook County Real Estate Board, with the consent of appellees, to appear on behalf of appellees to defend their interests and the interests of the Registrar of Titles of Cook County, Illinois, and of the members of the Cook County Real Estate Board and their clients, who have lands registered under the act entitled, "An Act Concerning Land Titles", approved May 1, 1897. (Laws of Illinois of 1897, p. 141.)

This cause involves the validity of the Illinois statute concerning land title registration known as "The Torrens Act". The decision of this honorable Court in this case will affect the title to thousands of pieces of real estate in Cook County, Illinois, registered under the act, which are in the aggregate worth more than a billion dollars. This cause was set for argument for the week of March 10, 1930, and counsel for both parties were ready to argue the case when it was reached on the call. Adjournments of this honorable Court caused by the deaths of the late Chief Justice Taft and the late Justice Sanford required the passing of the case to the session beginning the week of April 14.

This affiant is one of the solicitors for the defendants in the case of *William Burry, Jr., and Charles Y. Free-*

man, executors of the will of Suzanne King Bruwaert, v. J. Andrews King, et al., now pending in the Superior Court of Cook County, Illinois, as No. 506894. In the defense of this case it is necessary for affiant to be in Paris, France, and Lausanne, Switzerland, for at least three weeks beginning March 31, 1930, where depositions are to be taken of witnesses called by solicitors for complainants and by solicitors for defendants in said cause.

Affiant will not be able to return to the United States prior to April 28, 1930. He will make every effort to be present before this honorable Court to present the case at bar on behalf of appellees, if the case is passed to a day later than April 28, 1930. It is the desire of affiant's clients that he present this case by oral argument, and they are not willing that associate counsel be substituted.

Floyd E. Thompson.

Subscribed and sworn to before me this 11th day of March, 1930.

Irene A. Zeisler,
Notary Public.

(Notarial Seal)

Chicago, Illinois, March 11, 1930.

The undersigned solicitors for appellants this day acknowledge receipt of six copies of the foregoing motion and suggestions in support thereof, and say that they have no objection to the allowance of said motion.

Matthias Concannon,
Franklin E. Vaughan,
Solicitors for Appellants.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE CERTIFIED COPY OF OPINION.

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

(34,478)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 347.

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE CERTIFIED COPY OF OPINION.

Now come the appellants, Edward Eliason and Elin Eliason, by Matthias Concannon and Franklin E. Vaughan, their attorneys, and move the court for leave to file a certified copy of the opinion of the Supreme Court of Illinois in the case of Sheaff v. Duplissis, *et al.*, for the reasons assigned in the suggestions filed herewith.

EDWARD ELIASON,
ELIN ELIASON,
By: MATTHIAS CONCANNON,
FRANKLIN E. VAUGHAN,
Their Attorneys.

SUGGESTIONS IN SUPPORT OF MOTION.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Matthias Concannon, being first duly sworn, says that he is one of the attorneys for the appellants in the above entitled cause; that the Supreme Court of Illinois on April 17, 1930, delivered an opinion in the case of Sheaff v. Duplissis, *et al.*, which is cited and quoted from in appellants' reply brief about to be filed in this cause.

Affiant further says that the time within which application may be made for a rehearing in the case of Sheaff v. Duplissis, *et al.*, has not yet expired, and the case therefore is subject to further consideration by the Supreme Court of Illinois. The opinion of that Court has not yet been published. Appellants desire to obtain leave to file a certified copy of the opinion aforesaid for the purpose of making the whole opinion available to the Court.

MATTHIAS CONCANNON.

Subscribed and sworn to before me this 23rd day of April, A. D. 1930.

LOUISE BERG,

(NOTARIAL SEAL) *Notary Public.*

Chicago, Illinois, April 24, 1930.

The undersigned hereby acknowledge receipt of six (6) copies of the foregoing motion and suggestions in support thereof.

FLOYD E. THOMPSON,

HENRY JACKSON DARBY,
Attorneys for Appellees.

J. SCOTT MATTHEWS,
Counsel for Registrar of Titles.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 347.—October Term, 1929.

Edward Eliason and Elin Eliason, Appellants, *vs.* Charles Wilborn, Carrie Wilborn, and Noel State Bank.	Appeal from the Supreme Court of the State of Illinois.

[May 19, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

The appellants had been holders of a certificate of title under the Torrens Act of Illinois. As a result of negotiations they entrusted this certificate to one Napletone, who is alleged to have presented it together with a forged conveyance to himself to the Registrar and by those means to have obtained from the Registrar a new certificate of title in Napletone, on May 19, 1926. Napletone a few days later sold and conveyed to the Wilborns, appellees, whose good faith is not questioned. After the Wilborns had bought but before a new certificate was issued to them, they had notice of the appellants' claim and the appellants notified the Registrar of the forgery and demanded a cancellation of the deeds and certificates to Napletone and the Wilborns and the issue of a certificate to themselves. The Registrar refused and this petition is brought to compel him to do what the appellants demand. It was dismissed on demurrer by the Circuit Court of the State, and the judgment was affirmed by the Supreme Court. 335 Ill. 352. The Supreme Court construed the statutes as giving title to the Wilborns, who purchased in reliance upon the certificate held by Napletone. Whether we are bound to or not we accept that construction and its result. The petitioners appealed to this Court on the ground that the statute, construed as it was construed below, deprived the appellants of their property without due process of law contrary to the Constitution of the United States, by making the certificate of title issued by the Registrar upon a forged deed without notice to them conclusive against them.

The sections objected to are appended. They are as in the original Act of 1897, except § 40, amended by the laws 1925, p. 250.*

*Section 40:

"The registered owner of any estate or interest in land brought under this Act shall, except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject to the charges hereinabove set forth and also only to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all others except:

(1) Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land under the lease. The term lease shall include a verbal letting.

(2) General taxes for the calendar year in which the certificate of title is issued, and special taxes or assessments which have not been confirmed.

(3) Such right of appeal, writ of error, right to appear and contest the application, and action to make counterclaim as is allowed by this Act."

Section 42:

"Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

Section 46:

"The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

Section 47:

"A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferee has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the

The appellants seem to claim a constitutional right to buy land that has been brought under the Torrens Act free from the restrictions that that Act imposes. But they have no right of any kind to buy it unless the present owner assents, and if, as in this case, the owner from whom the appellants bought, offered and sold nothing except a Torrens title we do not perceive how they can complain that that is all that they got. Even if the restrictions were of a kind that was open to constitutional objection the appellants bought knowing them and got what they paid for, and knew that they were liable to lose their title without having parted with it and without being heard. Even if they had been the original holders under the Torrens Act and had attempted to save their supposed rights by protest the answer would be that they were under no compulsion when they came into the system, that an elaborate plan was offered of which the provisions objected to were an important part, and that they could take it as it was or let it alone. There are plenty of cases in which a man may lose his title when he does not mean to. If he entrusts a check indorsed in blank to a servant or friend he takes his chance. So when he entrusts goods to a bailee under some factors' acts that are well

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original and duplicate certificate the date of the transfer, the name of the transferee and the volume and folium in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled'."

Section 54:

"A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding five years where the land is in actual possession of the lessee or his assigns, shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this act. On the completion of such registration, the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

Section 58, (omitting immaterial parts):

"In the event of a duplicate certificate of title being lost, mislaid or destroyed, the owner . . . may make affidavit . . . and the registrar, if satisfied as to the truth of such affidavit and the *bona fide* of the transaction, shall issue to the owner a certified copy of the original certificate . . . and such certified copy shall stand in the place of and have like effect as the missing duplicate certificate."

known. So, more analogous to the present case, a man may be deprived of a title by one who has none; as when an owner who has conveyed his property by a deed not yet recorded executes a second deed to another person who takes and records the later deed without notice of the former. There are few constitutional rights that may not be waived.

But there is a narrower ground on which the appellants must be denied their demand. The statute requires the production of the outstanding certificate, as a condition to the issue of a new one. The appellants saw fit to entrust it to Napletone and they took the risk. They say that according to the construction of the act adopted the Registrar's certificate would have had the same effect even if the old certificate had not been produced. But that, if correct, is no answer. Presumably the Registrar will do his duty, and if he does he will require the old certificate to be handed in. It does not justify the omission of a precaution that probably would be sufficient, to point out that a dishonest official could get around it. There is not the slightest reason to suppose that Napletone would have got a certificate on which the Wilborns could rely without the delivery of the old one by the appellants. As between two innocent persons one of whom must suffer the consequence of a breach of trust the one who made it possible by his act of confidence must bear the loss.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.